Y 4. J 89/1: 99/52

AFFIRMATIVE ACTION AND FEDERAL CONTRACT COMPLIANCE

223

HEARING

BEFORE THE

SUBCOMMITTEE ON
CIVIL AND CONSTITUTIONAL RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY
HOUSE OF REPRESENTATIVES

NINETY-NINTH CONGRESS

FIRST SESSION

ON

AFFIRMATIVE ACTION AND FEDERAL CONTRACT COMPLIANCE

NOVEMBER 7, 1985

Serial No. 52

ORIGINAL

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE

60-658 O WASHINGTON : 1986

For sale by the Superintendent of Documents, Congressional Sales Office
U.S. Government Printing Office, Washington, DC 20402

Z

COMMITTEE ON THE JUDICIARY

PETER W. RODINO, JR., New Jersey, *Chairman*

JACK BROOKS, Texas
ROBERT W. KASTENMEIER, Wisconsin
DON EDWARDS, California
JOHN CONYERS, JR., Michigan
JOHN F. SEIBERLING, Ohio
ROMANO L. MAZZOLI, Kentucky
WILLIAM J. HUGHES, New Jersey
SAM B. HALL, JR., Texas
MIKE SYNAR, Oklahoma
PATRICIA SCHROEDER, Colorado
DAN GLICKMAN, Kansas
BARNEY FRANK, Massachusetts
GEO. W. CROCKETT, JR., Michigan
CHARLES E. SCHUMER, New York
BRUCE A. MORRISON, Connecticut
EDWARD F. FEIGHAN, Ohio
LAWRENCE J. SMITH, Florida
HOWARD L. BERMAN, California
RICK BOUCHER, Virginia
HARLEY O. STAGGERS, JR., West Virginia

HAMILTON FISH, JR., New York
CARLOS J. MOORHEAD, California
HENRY J. HYDE, Illinois
THOMAS N. KINDNESS, Ohio
DAN LUNGREN, California
F. JAMES SENSENBRENNER, JR., Wisconsin
BILL McCOLLUM, Florida
E. CLAY SHAW, JR., Florida
GEORGE W. GEKAS, Pennsylvania
MICHAEL DeWINE, Ohio
WILLIAM E. DANNEMEYER, California
HANK BROWN, Colorado
PATRICK L. SWINDALL, Georgia
HOWARD COBLE, North Carolina

M. ELAINE MIELKE, *General Counsel*
GARNER J. CLINE, *Staff Director*
ALAN F. COFFEY, JR., *Associate Counsel*

SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

DON EDWARDS, California, *Chairman*

ROBERT W. KASTENMEIER, Wisconsin
JOHN CONYERS, JR., Michigan
PATRICIA SCHROEDER, Colorado
CHARLES E. SCHUMER, New York

F. JAMES SENSENBRENNER, JR., Wisconsin
MICHAEL DeWINE, Ohio
WILLIAM E. DANNEMEYER, California

CATHERINE A. LEROY, *Counsel*
PHILIP G. KIKO, *Associate Counsel*

CONTENTS

WITNESSES

	Page
Ralph Davidson, chairman of the board, Time Inc	16
Testimony of Mr. Davidson	17
William L. Robinson, director, Lawyers' Committee for Civil Rights Under Law; accompanied by Richard T. Seymour, director, Employment Discrimination Project, Lawyers' Committee for Civil Rights Under Law	27
Testimony of Mr. Robinson	33
Statement of Mr. Seymour	33
George P. Sape, vice president, Organization Resources Counselors, Inc	114
Testimony of Mr. Sape	119
Vincent J. Apruzzese, vice-chairman, Labor Relations Council, U.S. Chamber of Commerce; and Jean Hails, 1986 president, Associated Builders and Contractors	151
Testimony of Mr. Apruzzese	153
Testimony of Mrs. Hails	179

AVAILABLE

AFFIRMATIVE ACTION AND FEDERAL CONTRACT COMPLIANCE

THURSDAY, NOVEMBER 7, 1985

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS,
COMMITTEE ON THE JUDICIARY
Washington, DC.

The subcommittee met at 9:40 a.m., room 2226, Rayburn House Office Building, Hon. Don Edwards (chairman of the subcommittee) presiding.

Present: Representatives Edwards, Conyers, Schroeder, Sensenbrenner, DeWine, and Swindall.

Staff present: Stuart J. Ishimaru, assistant counsel: Phil Kiko, associate counsel.

Mr. EDWARDS. The subcommittee will come to order.

Today the subcommittee continues its ongoing examination of affirmative action, focusing on the requirement under Executive Order 11246 that Federal contractors take affirmative action to include women and minorities in their work forces. The administration is considering changing the current requirements, which require contractors to set numerical goals and timetables to hire and promote minorities and women.

Some in the administration, most notably Attorney General Edwin Meese, have mislabeled goals and timetables as quotas, and want to eliminate this requirement. Others, led by Labor Secretary William Brock, favor keeping goals and timetables as part of the Government's arsenal against discrimination.

It is my opinion that Mr. Meese is also up against the public opinion of the American people. A September Harris Poll indicates that a 75-percent majority favor Federal laws requiring affirmative action programs for women and minorities in employment and education, provided there are no rigid quotas. The American public believes that there must be real and effective affirmative action programs in order to truly bring about equal employment opportunities for all.

Last year the Government contracted out over $160 billion in business. It is not too much to ask of those benefiting from Government business to take positive and concrete steps to include minorities and women as employees.

So, this morning we are going to look at a number of different questions: How have the programs under Executive Order 11246 worked for the last 20 years; do businesses support goals and time-

tables; have quotas and timetables been turned into quotas; and so forth. We have a diverse group of witnesses with us today.

[Prepared statement of Mr. Edwards follows:]

PREPARED STATEMENT OF HON. DON EDWARDS

Today the Subcommittee continues its ongoing examination of affirmative action, focusing on the requirement under Executive Order 11246 that federal contractors take affirmative action to include women and minorities in their work forces. The Administration is considering changing the current requirements, which require contractors to set numerical goals and timetables to hire and promote minorities and women. Some in the Administration, most notably Attorney General Edwin Meese, have mislabeled goals and timetables as quotas, and want to eliminate this requirement. Others, led by Labor Secretary William Brock, favor keeping goals and timetables as part of the government's arsenal against discrimination.

Mr. Meese is also up against the American public. A September Harris poll indicates that a 75% majority favor "federal laws requiring affirmative action programs for women and minorities in employment and education, provided there are no rigid quotas." The American public believes that there must be a real and effective affirmative action program in order to truly bring about equal employment opportunities for all.

Last year, the government contracted out over $166 billion in business. It is not too much to ask of those benefitting from government business to take positive and concrete steps to include minorities and women as employees.

This morning we will look at a number of different questions. How have the affirmative action requirements worked for the last 20 years? Do businesses support the use of goals and timetables? Have goals and timetables been turned into quotas, and if so, by whom? If we change the affirmative action requirements for federal contractors, what should be required, and what will be the implications of change in the present Executive Order?

We have a diverse group of witnesses this morning, representing part of the range of opinion on the issue. Although I am anxious to hear from our witnesses, let me add one more point.

We invited both the Justice and Labor Departments to testify today, and both declined, stating that since the decision whether to modify the Executive Order has not been made, it would not be proper to comment on it in public. I can understand this decision. But last week, on Halloween, Assistant Attorney General Wm. Bradford Reynolds appeared before the Wilmington, Delaware Rotary Club and gave a stinging denunciation of goals and timetables and the Executive Order. I am somewhat disturbed that this Subcommittee ranks lower than the Wilmington Rotary Club in the eyes of the Justice Department. If the Justice Department wants to discuss this matter in a public forum, let them accept our invitation to come before Congress to engage in an informed dialogue, rather than to go and spread misinformation around the country.

Before I introduce the first witness, I yield to the gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

I certainly welcome these hearings, because, I think, the more light that is shed on the crusting of interpretations that have surrounded the Executive order that was issued almost 20 years ago, the more it will be demonstrated that there is a need to change that Executive order.

The Executive order may very well have been an appropriate response to discrimination that occurred in the 1960's; however, I don't think we should have a 1960's response to the 1980's problems. By putting our feet in the sand, and not even considering any changes in the Executive order, we are again using the solutions of 20 years ago to try to apply to the problems of today.

Very frankly, the goals and timetables provision in the Executive order, and the interpretations of them, trouble me, because in many instances they have been interpreted as imposing quotas. One quotes various types of polls. Polls give the answer depending

upon the question that is written. I think that the gentleman from California, and the rest of the American public, would find equally strong opposition to quotas, if that was the question that was placed on a national poll, such as the Harris Poll.

Frankly, I don't think that the whole business of changing this Executive order is something that is a Reagan-Meese cheering section project. On October 23, Nathan Perlmutter, the executive director of the Anti-Defamation League of B'nai B'rith, which can hardly be called a new right conservative organization, wrote the President as follows:

> Government mandated goals and timetables are particularly troublesome as applied to Federal contractors. Placing the Government's impramater on goals and timetables in an Executive order or in Federal regulation has a coercive effect on those employers who do business with the Government. Threatened with debarment for noncompliance, the contractor will understandably lean to the easy route and transform a goal into a quota.

And that's just the practicality of it, completely.

Finally, Justice Stevens, in his decision in the case of *Fullilove* v. *Klutznik*, said:

> The ultimate goal must be to eliminate entirely from governmental decisionmaking such irrelevant factors as a human being's race. The removal of barriers to access to political and economic progress serves that goal, but the creation of new barriers can only frustrate that progress.

Or, as Justice Powell and Justice Douglas have perceptively observed:

> Such protective barriers reinforce habitual ways of thinking in terms of classes instead of individuals. Preference based on characteristics acquired at birth foster intolerance and antagonism against the entire membership of the favored classes.

Justice Stevens, I think, has been somewhat critical of what the Justice Department has been trying to do, and, I think, that his statement is also very perceptive.

So, I look forward to these hearings. I don't think we should hide these hearings in the cloud of partisan politics, nor do I think we should hide these hearings in the cloud of trying to deflect the debate over whether—or what the debate should be; and that is whether goals and timetables have been included as quotas.

Finally, I would like to include into the record some letters that have been submitted to me: Mr. Perlmutter's letter; a letter dated November 4 on the Committee on Academic Nondiscrimination and Integrity; a news release from the American Subcontractors' Association; a news release from the Associated Builders & Contractors; a news release from the U.S. Chamber of Commerce; a letter to the President dated October 28 by the National Jewish Coalition; and a statement of purpose from the Color Blind Coalition, which announced its formation on Tuesday.

Mr. EDWARDS. Thank you, and without objection they will be entered into the record.

[The documents referred to follow:]

ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH,
New York, NY, October 23, 1985.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: Noting recent press reports on proposed changes in federal affirmative action regulations, I would like to take this opportunity to reiterate the Anti-Defamation League's support for nondiscriminatory efforts to ensure equal opportunity in government contracts. We are concerned, however, with the imposition of goals and timetables which often function as quotas, limiting rather than expanding job opportunities.

Government-mandated goals and timetables are particularly troublesome as applied to federal contractors. Placing the government's imprimatur on goals and timetables in an executive order or in federal regulations has a coercive effect on those employers who do business with the government. Threatened with debarment for noncompliance, a contractor will understandably lean to the easy route and transform a goal into a quota.

A quota arbitrarily favors some while arbitrarily punishing others. This, regardless of its intentions. The civil rights movement was designed to outlaw discrimination. The return of quotas, masqueraded as government-sanctioned goals and timetables, is contrary to the high purposes of our civil rights battles.

Sincerely,

NATHAN PERLMUTTER,
National Director.

COMMITTEE ON ACADEMIC NONDISCRIMINATION AND INTEGRITY,
New York, NY, November 4, 1985.

The PRESIDENT,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: We the undersigned believe that the time is ripe to reaffirm the original objectives of Presidential Order 11246.

While the Order is meritorious and timely, its subsequent interpretations have led to the setting of mandatory goals and precise timetables and hence to the establishment of formal or informal hiring quotas. What was intended as a tool for the advancement of equal opportunity for all became a lever for the preferential treatment of some.

Over the years, complaints against affirmative discrimination occurred too frequently to be lightly dismissed as a temporary aberration. A game of numbers should not be sufficient justification for overlooking merit or abrogating seniority: We are dedicated to a different concept of a just society: one that makes a strenuous effort to provide equal opportuinity for all, regardless of race or economic background, to develop their abilities and to compete fairly for positions. Therefore, though we all supported the cause of human equality and worked aggressively for a fair society, we feel equally determined to oppose discrimination in reverse.

We ask you to make explicit in your revisions that hiring goals and timetables may not be made mandatory.

This will again allow legitimate affirmative action to promote equal opportunity, untainted by the burden of discrimination.

Sincerely,

Howard Adelson, CUNY, City College; Fred Baumann, Kenyon College; Walter Berns, American Enterprise Institute; Arthur Bestor, U. of Washington; Bruno Bettelheim, U. of Chicago; Isadore Blumen, Cornell U.; Edgar Borgatta, U. of Washington; R. Creighton Buck, U. of Wisconsin; Bernard Davis, Harvard U.; Solomon Fabricant, New York U.; Paula Fichtnir, CUNY, Queens College; Nathan Glazer, Harvard U.; Robert Hexter, U. of Minnesota; Gertrude Himmelfarb, CUNY, Graduate Center; Jack Hirshleifer, U. of California, Los Angeles; Sidney Hook, Hoover Institution; Erich Isaac, CUNY, City College; Paul Kurtz, SUNY, Buffalo; Eugene Rostow, Yale Law School; Paul Seabury, U. of California, Berkeley; Malcolm Sherman, SUNY, Albany; David Sidorsky, Columbia U.; Philip Siegelman, San Francisco State U.; Miro Todorovich, CUNY, Bronx Community College; L. Pierce Williams, Cornell U.; Cyril Zebot, Georgetown U.

ERRATUM

The Signature of Professor Seymour Martin Lipset, a sociologist from Stanford U., was inadvertently omitted from the CANI letter to President Reagan.

[News Release of the American Subcontractors Association]

ASA CALLS FOR END TO AFFIRMATIVE ACTION QUOTAS

The American Subcontractors Association has asked President Reagan to sign a new executive order on affirmative action that specifically excludes the use of quotas, goals or other numerical standards.

"ASA is opposed to the use of quotas, goals or other numerical standards to measure affirmative action by employers," said A.E. (Gene) Marchbanks, ASA president. "Such quantitative standards lead to harassment, abuse, and reverse discrimination."

In a letter to the president, Marchbanks said the employment goals established by the Office of Federal Contract Compliance Programs (OFCCP) to administer the existing Executive Order 11246 are arbitrary and without a statistical basis.

Construction contractors with federal or federally-assisted contracts in excess of $10,000 must meet minority goals set for their region and a national female goal of 6.9 percent. In order to prove compliance, contractors are required to fulfill "16 affirmative action steps," which include keeping lengthy lists of minority and women's groups, subcontractors, and suppliers, constant notification recordkeeping on each new project of business development; and an extraordinary amount of documentation, including letters, memoranda, telephone logs, and more.

"The goals fail to take into consideration the variety of skills and different levels of training required for the various trades in the construction industry," Marchbanks said.

If a contractor fails to meet these goals, OFCCP requires it to sign a conciliation agreement that cites the contractor's failure to meet a "goal" as a "deficiency." Marchbanks said the OFCCP goals in reality are enforced as quotas.

ASA has long urged a reexamination of the government's affirmative action policy and the removal of unnecessary burdens on employment practices.

"ASA supports the principles embodied in the equal opportuinity laws of the United States. ASA believes that discriminatory practices which deny individuals the opportunity of learning the skills or working in the construction industry are morally harmful to our nation and industry," Marchbanks said.

AMERICAN SUBCONTRACTORS ASSOCIATION, INC.,
Alexandria, VA, October 30, 1985.

The PRESIDENT.
The White House,
Washington, DC.

DEAR MR. PRESIDENT: The American Subcontractors Association (ASA) encourages you to sign a new executive order on affirmative action. We recommend that such a new executive order specifically exclude the use of quotas, goals, or other numerical standards as an affirmative action tool.

ASA is a national trade association with nearly 6,000 firms representing all major construction trades in 55 chapters. It is the only national organization that speaks exclusively for the interests of construction subcontractors. ASA is dedicated to improving general business conditions for subcontractors through unified and cooperative actions. Many ASA members contract with the federal government and thus have a direct interest in the rules regulating affirmative action for federal contractors.

The Office of Federal Contract Compliance Programs (OFCCP), which administers the existing Executive Order 11246, mandates employment goals for construction contractors. The goal promulgated by OFCCP for the construction industry have no statistical basis and were established arbitrarily. The goals fail to take into consideration the variety of skills and different levels of training required for the various trades in the construction industry.

If a contractor is not meeting his goals, OFCCP assumes that it cannot possibly be doing enough paperwork and documentation to be in compliance with the "16 affirmative action" steps mandated by the agency. Such contractors are often required

to sign a conciliation agreement which cites the contractor's failure to meet a "goal" as a "deficiency."

Thus, in reality, OFCCP's "goals" are enforced as quotas.

ASA supports the principles embodied in the equal opportunity laws of the United States. ASA believes that discriminatory practices which deny individuals the opportunity of learning skills or working in the construction industry are morally harmful to our nation and industry.

However, ASA is opposed to the use of quotas, goals or other numerical standards to measure affirmative action by employers. Such quantitative standards lead to harassment, abuse, and "reverse discrimination."

Mr. President, ASA salutes your efforts to reexamine the fundamental concepts that underlie the government's present approach to affirmative action. But we believe the time for study has ended.

Thus, we urge you to sign immediately a new executive order on affirmative action that excludes the use of quotas, goals, or other numerical standards as an affirmative action tool.

Respectfully yours,

A.E. (GENE) MARCHBANKS,
President.

[News Release, Associated Builders and Contractors, Inc.]

ABC AFFIRMATIVE ACTION MUST FOCUS ON RECRUITMENT, TRAINING NOT JUST HIRING

WASHINGTON, D.C.—Associated Builders and Contractors issued a statement today by its 1986 national president, Mrs. Jean Hails, stating that the Office of Federal Contract Compliance "Seems to have lost sight of the basic mission of the program—to promote the recruitment, training and hiring of minorities and women. None of these elements can stand alone." Hails said. OFCCP, however, has focused almost entirely on the third element, hiring, to the detriment of the affirmative action program.

Hails said "It is time for the Administration and the Congress to reexamine the fundamental concepts which underlie the government's present approach to affirmative action. We urge the executive branch to take this opportunity to develop and implement a more positive regulatory strategy encompassing all three elements of affirmative action."

Hails said that "While ABC supports affirmative action programs, we unalterably oppose the mandatory implementation of quotas or numerical goals. We believe that the regulations implementing Executive Order 11246 should be totally rewritten eliminating any statistical quota or goal mandates. We support the implementation of a voluntary recordkeeping provision that would provide an employer or contractor with an "affirmative defense" such as the legislation now being considered by the Senate for immigration reform. I am confident that the over all compliance percentage with this form of regulation would be very high, fostering both entrance of minorities and women into the construction trades, yet without the current regulatory detriments to the industry."

Hails, who is president of Hails Construction Company in Roswell, Georgia is the first woman president to head up the 18,000 member firm open shop construction association.

[News Release, U.S. Chamber of Commerce]

PRESIDENT REAGAN GETS U.S. CHAMBER'S OFFER TO AID IN LIFTING EMPLOYMENT REQUIREMENTS FOR CONTRACTORS

WASHINGTON, August 19.—The U.S. Chamber of Commerce, restating its historic opposition to governmental imposition of quotas on the nation's employers, applauded the administration's proposal to rescind the present quota policy for federal contractors.

In a communication to President Reagan, Chamber President Richard L. Lesher welcomed the proposed changes in Executive Order 11246, which sets out employment obligations for federal contractors. He also indicated the business federation's strong support for the voluntary use of goals and timetables rather than mandated quotas. The text of Lesher's communication read:

"DEAR MR. PRESIDENT: American business has been major force in the significant strides our nation has made to eliminate discrimination in employment. The U.S. Chamber of Commerce strongly adheres to the Administration's policy of ensuring equal employment opportunity to every American.

"In that context, we applaud proposed changes in Executive Order 11246, the Presidential directive that sets out the employment obligations for the nation's federal contractors.

"To ensure a competent work force, employers must have the right to employ or to promote the best qualified applicants/employees without regard to race, sex, religion, color or national origin. In those areas where past economic, geographic or social conditions have deprived some persons of employment opportunities, employers should take *affirmative* action to recruit, employ, train, and promote qualified members of the protected classes. However, our concept of affirmative action includes the belief that the road to equal employment opportunity for one group should not be paved with new varieties of discrimination against other groups.

"Moreover, the U.S. Chamber opposes the Federal Government's imposition of *quotas* or other discriminatory devices on employers. Instead, we support and encourage measurable methods to increase participation in the work force through the *voluntary* use of goals, timetables and good faith effort—and through strict enforcement of the law. It is our understanding that the changes being proposed in Executive Order 11246 would not prohibit voluntary use of goals and timetables.

"To the extent that the administration is considering rescinding current quota policy for federal contractors, we view it as a positive step, and we encourage you to modify Executive Order 11246 accordingly.

"Please let us know how we can help accomplish your policy objective of eliminating the requirement that federal contractors use numerical quotas, goals, ratios or objectives in employee recruitment, training, hiring or promotion."

NATIONAL JEWISH COALITION,
Washington, DC, October 28, 1985.

Hon. RONALD REAGAN,
The White House
Washington, D.C.

DEAR MR. PRESIDENT: The National Jewish Coalition urges you to support the efforts by your Attorney General Edwin Meese to revise Executive Order 11246 dealing with affirmative action. These revisions would finally eliminate the requirement that federal contractors use quotas in their hiring practices.

The original intent of this important order required affirmative action programs to correct past discrimination by actively recruiting minorities for hiring and promoting. However, over the years this order has evolved through bureaucratic regulation and judicial interpretation into a rule requiring contractors to establish hiring quotas for women and minorities. Even in the absence of actual discrimination, a contractor is currently required to hire specific percentages of various groups until the work force is in statistical parity with the labor market. This in practice, under the guise of goals and timetables, has resulted in a government sanctioned quota program.

We have hailed the steps your administration has taken to achieve a civil rights policy which strives to provide equality of opportunity for all citizens. Returning Executive Order 11246 to its original purposes would eliminate an arbitrary and discriminatory barrier—hiring quotas—in favor of a truly non-discriminatory policy of affirmative action.

Sincerely,

RICHARD J. FOX,
National Chairman.

STATEMENT OF PURPOSE

The Color-Blind Coalition includes academic, professional, ethnic, business and other organizations and individuals who share a concern over the direction which affirmative action has taken.

The members of the coalition believe that discrimination on the basis of race, color, religion, sex, or national origin is absolutely intolerable, for it destroys the fundamental principles uniting a democratic and pluralistic society. Each American should be treated as an individual, *without* regard to immutable characteristics or

affiliations. Both public and private decisionmakers have the obligation to judge others on their merits and qualifications without regard to group membership.

We also support affirmative action, but believe that it has taken a wrong turn. We hope to correct its course. We hope that affirmative action will once again represent positive efforts to ensure equality of opportunity, providing assistance in the form of education, training and outreach to those who would not otherwise acquire the qualifications necessary to make that concept a reality.

Because we believe that civil rights are individual rights, and not group entitlements, we disavow those policies, programs or systems which require preferential treatment for non-victims of discrimination. We commit ourselves to identifying and eliminating those policies and practices which require such preferential treatment.

To these ends and because the vast majority of Americans agree that merit, and not group membership, should be the basis of determining societal benefits and opportunities, we commit ourselves to educating the public, the media, the Congress, the Administration and others on our views, and the programs or policies we identify as contrary to individual rights. We tolerate and welcome a diversity of opinions on the means to achieve the ends to which we agree, but believe that a void in leadership requires our participation in the public policy process.

Mr. EDWARDS. And, without objection, I will enter into the record statements from Hyman Bookbinder, Washington representative to the American Jewish Committee, the American Jewish Congress, the B'nai B'rith Women, and the National Education Association.

[Documents referred to follow:]

STATEMENT OF HYMAN BOOKBINDER, WASHINGTON REPRESENTATIVE OF THE AMERICAN JEWISH COMMITTEE

Mr. Chairman, I am pleased that you are conducting a hearing today to examine the implication of a proposed Executive Order which would seriously impair the authority of the Federal government to promote affirmative action on the part of government contractors. I request that you make this statement a part of your record of the hearing.

Recent news that the White House has delayed action on the proposed order at least until after the President's return from the Geneva summit conference is encouraging. It suggests that some second thoughts have developed over the appropriateness of the proposed order. And small wonder that there should be such second thoughts, considering the range of opposition that has developed.

It is most unusual for members of a President's Cabinet to express public disagreement with another member's recommendations to the President. But the proposed Executive Order has caused so much concern that there has indeed been public disagreement. For example, in response to letters I wrote to them, I received strong endorsements for the position of my organization from Secretary of State George Shultz and HUD Secretary Samuel Pierce. Mr. Shultz wrote me: "You may be assured that I firmly support the principles of affirmative action, including the prudent use of goals and timetables, to ensure equality of opportunity on the basis of talent and expertise." Writing on behalf of Secretary Pierce, HUD General Counsel John J. Knapp wrote me: "The Secretary has been strongly supportive of Secretary Brock's arguments in favor of retaining the present structure and substance of the (present Executive) Order, including the appropriate utilization of goals and timetables."

While this statement is submitted on behalf only of my own organization, the American Jewish Committee, I am pleased to advise the sub-committee that our position is endorsed by the overwhelming majority of national and local Jewish organizations. Public statements have been issued by the Union of American Hebrew Congregations, the American Jewish Congress, and the National Council of Jewish Women. At a meeting on October 21 of the Executive Committee of the National Jewish Community Relations Advisory Council, a co-ordinating body of 11 national and over 100 local Jewish councils, only 2 out of 60 delegates opposed a motion to urge President Reagan to reject the proposed order.

The American Jewish Committee's rejection of the proposed order is based on a simple but very crucial truth: There has been some very significant progress in our national goal of equal employment opportunity—but not nearly enough to permit a dismantling of the tools we have developed to achieve that progress.

The reported "draft" of changes in Executive Order 11246 would constitute such a dismantling and we have therefore called upon President Reagan to reject the proposed changes. On August 15, Mr. Howard Friedman, president of the American

Jewish Committee, in a letter to President Reagan, declared that the proposed action would be a "needless and ominous over-reaction to occasional abuses which have developed—(and) would cause a chilling effect over all affirmative action programs." (Full text of letter attached—see Appendix A)

This proposed change would significantly exacerbate an already disturbing situation created by the Administration's action earlier this year requesting 51 local jurisdictions to modify their ongoing affirmative action plans. That action, as we have all come to know, caused much confusion and anxiety across the country, and resulted in anguished protests from local officials, both Republican and Democratic. On that earlier occasion, Mr. Friedman again spoke out, expressing our concern that the Department's action "will reopen old wounds, and will have the effect of increasing tensions and disrupting social peace in communities across the country." (See Appendix B)

Mr. Friedman's comment at the time, that the Justice action "sweeps into a common ambit decrees which employ goals and timetables (the prudent use of which we strongly endorse) as well as decrees which employ quotas," applies just as clearly to the present proposal for changes in Executive Order 11246. Thus, let me state a second simple but very critical truth, as we profoundly believe it: Racial or religious or other quotas are wrong and should not be mandated or permitted by law or regulation—but the use of statistical tests or goals are not necessarily improper and have in fact been very helpful.

In challenging these two developments—the second of which I realize is only a proposal at this time—I do not challenge the intent or the good faith of the Administration. I do not doubt its desire to see further progress in equal employment opportunity, and I do understand their concern about occasional abuses and distortions which have developed over the years in the affirmative action picture. But there are many civil rights advocates and organizations that are so upset about these developments that they have challenged the very integrity of the Administration. In the weeks since the report of the proposed order, I have sensed an intensity of concern and resentment at least equal to that which developed after the unfortunate Bob Jones action several years ago.

The American Jewish Committee, let me repeat, is strongly opposed to quotas. On numerous occasions, I have testified before Congressional committees, including this one, explaining in detail why we oppose inflexible, mandatory quotas in both employment and education. I will not elaborate on that absolute commitment we have in opposition to quotas; we consider them wrong in principle, bad in practice, destructive of individual rights and contrary to the best interests of all Americans, including the disadvantaged. To those who argue that quotas are necessary on a short-term basis to remedy entrenched patterns of discrimination in our work force, our response is that their inherent dangers outweigh any temporary gains they might bring. Quotas are qualitatively different from other forms of race-conscious relief and their use undermines the concept of individual merit and the very principle of equal opportunity itself.

But the issue of quotas is not really involved in the present dispute over Executive Order 11246. If it were, I would now be testifying in support of the proposed changes. In the name of fighting quotas, the draft order would prohibit the use of forms of affirmative action which have, based on all available data, operated in beneficial and constitutionally acceptable forms for two decades.

Not only does the present Executive Order not authorize the use of quotas, it expressly prohibits them. Let me cite the exact words, from Revised Order No. 4, the instruction to contracting agencies in implementation of Executive Order 11246:

"(e) *Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.*"

What could be clearer than this instruction? It is most discouraging to find journalists and public officials and others, despite this clear language, continuing to describe the Executive Order as requiring quotas. Thus, if the proposed changes are intended to outlaw quotas, the answer is simple: they are now outlawed.

But the situation is not that simple, of course. There are those who refuse to see any difference between quotas and goals, insisting that it is just a semantic quibble. A careful study of the history of affirmative action and a careful reading of the relevant materials should be persuasive that there is indeed a major philosophical and operating difference between the two. Briefly stated, a quota involves a set-aside, an exclusionary number or percentage, available for members only of a named target group; it implies preference for such members over those outside the target group. Failure to reach the particular number of percentage is prima facia evidence of failure and possibly cause for sanctions of some kind.

"Goals and timetables" on the other hand, as defined in the Order No. 4 cited earlier, "should be attainable in terms of the contractor's analysis of its deficiencies and its entire affirmative action program. Thus, in establishing the size of its goals and the length of its timetables, the contractor should consider the results which could reasonably be expected from its putting forth every good faith effort to make its overall affirmative action program work." No preference is required, and no penalties if good faith effort can be demonstrated.

Thus, goals/timetables can and do serve to provide a measuring rod for meeting reasonable, realistic objectives—and also as a prod to employers to engage in a wide range of non-controversial affirmative action measures (recruiting, advertising, training, improved testing) in order to meet stated goals.

But there is another kind of opposition to goals which merits serious and even sympathetic hearing. Yes, some will argue, there is indeed a conceptual difference between a quota and a goal. But in practice, they contend, the difference has disappeared. Goals have become de facto quotas in so many instances that in order to avoid quotas, with its inevitable racial or other preferences, you have to say no to goals also. This is, of course, the rationale behind the Administration's policies.

It is the position of the American Jewish Committee that there is no factual basis for this assertion that goals have generally been distorted into de facto preferential, exclusionary quotas, that goals programs continue to serve as useful tools for affirmative action, and that therefore the draft proposal to outlaw goals is unwarranted and unnecessary and unwise.

I stress the absence of broad factual evidence of general corruption of goals programs. That does not mean that there have not been instances of such corruption. But anecdotal citations cannot be sufficient justification for sweeping changes in a federal program that has contributed to progress. To yield to such anecdotal evidence is to succumb to ideologues in and outside the Administration determined to score a philosophic victory.

Mr. Chairman, I urge you to listen to those across the land who are not insensitive to the underlying philosophical arguments about quotas and preferential treatment, but who are deeply involved in the realities of employment operations and equal opportunity aspirations. It is hard to exaggerate the importance of testimony offered by Mr. William McEwen, Director of Equal Opportunity Affairs for Monsanto Company, on behalf of the National Association of Manufacturers—testimony that so much parallels our position, that goals are not the same as quotas, and that they have been good for our nation's manufacturers, not bad.

I ask you to weigh heavily the editorial judgment of Business Week which concludes with these words: "Over the years, business and regulators have worked out rules and procedures for affirmative action, including numerical yardsticks for sizing up progress that both sides understand. It has worked and should be left alone."

And this distinguished business journal reminds its readers that Reagan Administration officials can often be heard saying, "if it ain't broke, don't fix it." Take that advice in regard to affirmative action, Business Week urges.

I stated above that anecdotal arguments are not sufficient for underlying changes in programs considered useful. But that does not mean they should be ignored either. There have been enough cases reported—some of them involving court action—to have led to a widespread public impression that we are indeed moving rapidly to a quota society. Resentments have developed over the widespread use of preference, leading to general suspicions about any kind of affirmative action. Needless to say, any individual or group that believes that affirmative action has led to a new form of discrimination is entitled to full administration and judicial review and relief. Any violation of constitutional rights—even if only a single individual is involved—must concern us all.

It should be clear that any victim of discrimination—"reverse" or traditional—can today use the courts and the federal agencies to seek relief. But the American Jewish Committee has always urged, and I do so today, that if there are indeed abuses from a program which the government itself has mandated, it is particularly incumbent upon the government to take steps to prevent or at least reduce the level of such abuse.

If we ask, as we do, that the proposed changes in the order be rejected by the President, we also have the right to ask, and we do, that a full review of the program be made to the end of promulgating additional instructions, and if found necessary, additional regulations to prevent the distortion of goals into de facto quotas resulting either from ignorance or over-zealousness.

And, finally, we have the obligation to seek as much information as possible about how the present programs are working. If the "anecdotes" do add up to a substan-

tial record of corruption, it may be necessary and only fair to modify our present position. For some time now I have called for more through research into the actual performance of affirmative action programs. I repeat that call now. But until and unless there is data which does indeed validate the argument that goals inevitably become quotas, we ask the Administration and the Congress not to throw the proverbial baby out with the bath water.

I said at the beginning of this statement that there has been progress in the equal opportunity picture. Yes, there has. But not nearly enough. Recent employment figures reflected some reduction in unemployment after several months of stagnation. But those figures caused no cheers in Black or Hispanic America, and especially none among the youth in those communities. Affirmative action alone—even the unacceptable use of quotas—cannot make a serious dent in unemployment rates as high as 20 or 30 or 40 percent. Basic economic growth, improved education, greater family stability—these and other factors will ultimately determine the employment prospects for all our people. But discrimination continues to be a challenge, and we dare not let up on our efforts, both public and private, to fight it.

In a Forward to the excellent report of the Potomac Institute, "Affirmative Action in the 1970's," Harold Fleming cogently sums up that challenge, and I am pleased to endorse his words:

"(Affirmative Action) has moved our society measurably closer to the democratic goal of equal opportunity... The gap remaining is too wide to justify relaxing our efforts and abandoning methods of proved effectiveness. If there are flaws in the execution of these methods, then by all means we should correct them. But let us not use them as a pretext for returning to the complacent and unfruitful policies of the past."

[Appendix A]

THE AMERICAN JEWISH COMMITTEE,
New York, NY, August 15, 1985.

President RONALD REAGAN,
The White House,
Washington, DC.

DEAR MR. PRESIDENT: The American Jewish Committee urges you to reject the proposed executive order to bar the use of numerical goals and timetables in the administration of Labor Department affirmative action programs for Federal contractors. This would be a needless and ominous over-reaction to occasional abuses which have developed in some of these programs. It would cause a chilling effect over all affirmative action programs and would threaten to undo the progress which has taken place in the last 20 years. The civil rights community will and should be deeply concerned over the far-reaching consequences of this proposal.

The basic problem with the pending order is that it fails to make the important and demonstrated distinction between "quotas" and "goals." The American Jewish Committee for two decades has strenuously opposed the first because it seeks to fight one type of discrimination with another, but it supports the judicious use of "goals" as an appropriate tool for measuring progress in equal opportunity programs and as a prod to effective monitoring of such programs. There is an impressive record of progress under such "goals" programs, as administered by both the Republican and Democratic administrations over the last 20 years. Where "goals" programs have been distorted into de facto "quotas," the answer must be rigorous and supervision and correction, not the eradication of the programs themselves.

We believe your Administration should reject the blanket elimination of "goals" programs. Instead, we urge you to initiate consultations with all relevant groups to seek a consensus on affirmative action which avoids the dangers of discriminatory quotas but which can continue to produce needed improvement in employment of minorities and women.

Sincerely,

HOWARD I. FRIEDMAN, *President.*

[Appendix B]

THE AMERICAN JEWISH COMMITTEE STATEMENT ON THE JUSTICE DEPARTMENT'S AFFIRMATIVE ACTION POSITION

In response to its reading of the decision of the United States Supreme Court in *Firefighters Local Union No. 1784* v. *Stotts*, the Department of Justice has asked ap-

proximately fifty cities, counties and states to seek modification of affirmative action decrees which employ numerical goals and/or quotas in order to increase employment of minorities and women. These decrees related principally to police and fire departments.

This action by the Department of Justice is based upon its conviction that the *Stotts* ruling restricts "make-whole relief only to those who have been actual victims of illegal discrimination." The holding of *Stotts* is that an employer may not lay off employees with greater seniority in favor of employees with lesser seniority, in the face of a bona fide seniority system, merely for the purpose of preserving a certain racial percentage in the work force. The effect of the ruling on initial hiring practices is not clearly stated in the opinion and the language relied upon by the Department of Justice is not dispositive of the larger question.

The action of the Department of Justice has been perceived as an overly expansive interpretation of *Stotts* and has been productive of serious communal stress in communities which have been operating under existing court decrees. Most of the governmental units affected have challenged the Justice Department's position and have rejected the request to seek modification of the applicable court orders and consent decrees.

The American Jewish Committee is concerned over the action of the Justice Department not only in its inter-group relations aspect, but also in the manner in which the Department is seeking further development and clarification of the law. We have long made clear our profound opposition to racial and minority quotas and we reiterate that position. We have also expressed our support of the prudent use of responsible, realistic and flexible goals and timetables to measure affirmative action progress. We do so as a result of our conviction that it is sound public policy to advance growing numbers of minority people in the workforce generally, particularly in areas not historically characterized by significant minority employment. The action of the Justice Department sweeps into a common ambit decrees which employ goals and timetables, as well as decrees which employ quotas. Hence the Department's action blurs the important distinction between the two.

We support responsible efforts to secure clarification of the law in this area. That objective is not served by dragnet approaches which overstate the scope of existing decisions and seek retroactively to change existing decrees based upon an assumed change in the law. It would be far more effective and less disruptive of sensitive communal concerns to pursue the development of the law in this area in the traditional fashion—namely, a case-by-case development of the contours of the applicable law. And the law is not yet where the Justice Department considers it to be, as underscored by the fact that the Supreme Court has, since *Stotts*, declined to review several lower court rulings which are in apparent conflict with the Justice Department's expansive interpretation of *Stotts*.

As a practical matter, we believe that the drive by the Justice Department to reopen these settled cases will reopen old wounds, and will have the effect of increasing tensions and disrupting social peace in communities throughout the country. We urge the Justice Department to reconsider this action. Instead, we recommend that the Department press its views vigorously in future cases where quota remedies are at issue.

STATEMENT OF THE AMERICAN JEWISH CONGRESS BEFORE THE HOUSE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS, NOVEMBER 7, 1985

One of the American Jewish Congress' most vigorously pursued organizational purposes has been the achievement of equal opportunity for all Americans regardless of race, creed, color or sex.

It is out of this long and deeply felt commitment to equal opportunity that we oppose the revision of Executive Order No. 11246. As an organization, we are firmly opposed to quotas and ratio hiring except as remedies for proven discrimination. We recognize, however, that Government must not subsidize discrimination by doing business with contractors who fail to take all the necessary measures to eliminate bias and to encourage the employment and advancement of disadvantaged minorities. In so vast an enterprise as the Federal Contract Compliance Program, the absence of some reference to numerical indications and statistics may make it almost impossible to determine whether government contractors are, in fact, effectively seeking out, hiring and promoting qualified minorities.

At this time, rather than eliminating goals and timetables which have proven to be effective benchmarks for determining civil rights compliance, and which have been successful in increasing employment of historically disadvantaged groups, we

urge the strict enforcement of such statistical devices. Goals and timetables should be retained, as we continue to make sure that they are not abused, that they do not become quotas and that they are continually re-examined and only eliminated when a contractor's work force reflects the situation that would exist if a nondiscriminatory policy is consistently followed.

It is possible to devise racially neutral methods for helping the disadvantaged. For example, New York City sought to increase opportunities for minority workers and businessmen by setting aside a portion of city contracts for those contractors who either hire welfare recipients, displaced homemakers and disadvantaged veterans or perform their work in the economically disadvantaged neighborhoods of the city.

By the use of this type of racially neutral criteria, Government would be using its substantial contracting power to advance the cause of equal rights and to speed the day when our society can be truly color-blind.

STATEMENT OF BEVERLY DAVIS, PRESIDENT OF THE B'NAI B'RITH WOMEN TO THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS OF THE HOUSE COMMITTEE ON THE JUDICIARY ON THE ISSUE OF AFFIRMATIVE ACTION AND THE PROPOSED CHANGES IN EXECUTIVE ORDER 11246 NOVEMBER 7, 1985

DEAR CHAIRMAN EDWARDS. On behalf of B'nai B'rith Women I commend you for conducting a hearing today to examine the implications of the Reagan Administration's proposed Executive Order on Affirmative Action.

B'nai B'rith Women believes that the current Executive Order had worked very well over the past 20 years in helping to achieve equality of opportunity for all Americans—an objective to which BBW remains deeply committed. As Jewish women, we are often confronted with the tension between our own commitment to racial equality and our opposition to numerical quotas. Too often in the past, quotas have meant closed doors to Jewish applicants and dim prospects for Jewish ambitions. As women, we understand that our daughters' futures require the opening of more doors, not fewer; of more positive actions, not less. We are excited to see women as astronauts, doctors, lawyers, and college professors as a result of changes in the last decade in the attitude of society and women themselves. Our hopes for our children's future lie in vigorous enforcement of the laws against discrimination and ongoing effective outreach to women and minorities through education programs, job training, recruitment and promotional opportunities for qualified applicants.

If the new Executive Order is adopted the results would be traumatic—and devastating. Companies are not going to revert to an all-white, all-male workforce. The real battleground will be over the question of promotion—over who gets into management positions and who gets paid how much when they are there. Without goals and timetables companies would merely go through the motions of interviewing women and minorities.

B'nai B'rith Women believes that government has the responsibility to vigorously enforce affirmative action programs. We recognize that government also has the responsibility to prevent abuses in these programs. Goals and timetables are essential components of affirmative action plans. However, they must be drawn correctly, administered faithfully, and reviewed periodically. We urge that steps be taken to assure that personnel are familiar with the programs and comply with their provisions. Grievance procedures should be set up to provide speedy and effective ajudication of all complaints. The Department of Labor under this current administration published a study in 1983 showing that of 77,000 companies surveyed, minorities and women made significantly greater gains in employment at companies contracting with government than those that did not. One study found that between 1974 and 1981, companies covered by the Executive Order increased the number of minorities by 20% and women by 15%. The Administration is proposing to change this order so that affirmative action plans will not require goals and timetables. Such goals, they argue, violate a race- or gender-neutral approach that is the hallmark of true equality. However, the Executive Order has nothing to do with quotas. Indeed, the regulations specifically state, "Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work."

The Administration is also proposing as part of its revision of the Executive Order to prohibit the use of statistical data on race, gender, ethnic origin, etc., to be used to assess progress in affirmative action. B'nai B'rith Women opposes this change, and endorses the need to use statistical data to measure progress and assure effec-

tiveness of affirmative action. Such numerical data, however, must be gathered without infringing on an individual's privacy and must be used in a nondiscriminatory way.

We have seen in the past two decades very real changes in the American workforce. These have not occurred as fast as some of us would like to see, and a lot faster than some others would prefer, but the fact remains that affirmative action has produced greater equal opportunities for many women and minorities. Affirmative action reflects this nation's commitment to a society of equality and social justice for all. It has proven to be a national policy that must be retained.

NATIONAL EDUCATION ASSOCIATION,
Washington, DC, October 29, 1985.

Hon. DON EDWARDS,
Chairman, Subcommittee on Civil and Constitutional Rights, Washington DC.

DEAR CHAIRMAN EDWARDS: I am writing on behalf of the 1.7 million members of the National Education Association to express our strong support for the maintenance in its current form of Executive Order 11246, which is one of the most important federal procedures for combatting job discrimination. NEA members who work in higher education institutions which are contractors are particularly concerned about loss of federal protection from race and sex discrimination.

E.O. 11246 has been effective. According to the Department of Labor, in FY84, compliance reviews by the Office of Federal Contract Compliance Programs (OFCCP) covered contractors with a total of 2.9 million employees. In over 3200 cases where non-compliance by federal contractors was found, conciliation agreements were put in place.

The Executive Order is supported not only by civil rights and labor groups, but also affected industries. The National Association of Manufacturers in recent Congressional testimony about E.O. 11246 and Title VII stated, "The benefits of affirmative action have occurred not only to individuals of all creeds, colors, and sexes, but also to business and society . . . Industry does not believe that numerical goals for minority inclusion in the workforce, by themselves, constitute quotas."

Recent studies have shown positive effects under E.O. 11246. A study by Professor Jonathan Leonard at the University of California at Berkeley, which compared federal contractors subject to affirmative action with non-contractors in a sample of almost 70,000 establishments, found, ". . . the evidence in this study is that affirmative action and Title VII have been successful in promoting the integration of blacks into the American workplace." Other studies, including the 1984 report of the Potomac Institute, *A Decade of New Opportunities: Affirmative Action in the 1970's*, also found employment gains by minorities and women.

While critics of E.O. 11246 argue against quotas, the reality is that contractors are actually required only to make a good faith attempt to meet hiring goals and timetables.

The Administration's proposed revisions would undermine the entire purpose and usefulness of the Executive Order by barring the use of numerical goals and timetables, prohibiting the consideration of any statistical evidence to determine violations, and limiting the types of discrimination covered.

NEA has written to Secretary Brock to urge the retention of E.O. 11246 in its present form. I request that this letter, and the attached letter from NEA President Mary Futrell to Secretary Brock, be made part of the record of the hearing your Subcommittee is holding on this subject.

Mr. Chairman, we appreciate your commitment to affirmative action and look forward to working with you to ensure the preservation of E.O. 11246.

Sincerely,

KENNETH F. MELLEY,
Director of Government Relations/Political Affairs.

NATIONAL EDUCATION ASSOCIATION,
Washington, DC, September 25, 1985.

Hon. WILLIAM E. BROCK,
U.S. Department of Labor,
Washington, DC.

DEAR SECRETARY BROCK: The 1.7 million-member National Education Association (NEA), which represents employees in school districts and higher education institu-

tions throughout the country, urges you to retain Executive Order 11246 in its current status.

The NEA supports the current Executive Order both as public policy, and specifically as needed protection for our many members who work in higher education institutions. Executive Order 11246 assures that vast amounts of federal contract money does not subsidize discrimination.

Proposals to remove goals and timetables, and to forbid reviewing statistical information and hiring outcomes when assessing compliance would absolutely take the teeth out of current efforts to end discrimination. The burden on the complainants will be generally insurmountable if, in effect, provable intent is required before discrimination is found.

Particularly in higher education, where women and minorities continue to lag seriously behind white men in pay and promotion, weakening of the current Executive Order would remove one of the few tools capable of addressing this problem.

NEA represents college faculty and employees including potential claimants and therefore our perspective may be viewed as biased. However, the American Council on Education, which represents the higher education institution community who are the parties being regulated shares our concern for maintaining the Executive Order as it exists.

NEA's concerns regarding the continuation of Executive Order 11246 are based on our long involvement in working to achieve the goals of equity and excellence in education. We must not retreat from these goals because the future of our nation—our children—depends upon our actions today.

The NEA believes that personnel policies and practices must guarantee that no person should be employed, retained, paid, dismissed, suspended, demoted, transferred, or retired because of age, sex, race, religious belief, or disability (handicap). Further, NEA urges the development and implementation of affirmative action plans and procedures that will encourage employment of women positions and minorities.

Finally, we support the use of affirmative action to redress historical patterns of discrimination against women and minorities in education. It may be necessary to give preference in recruitment, hiring, retention, and promotion policies to certain racial groups or women or men to overcome past discrimination.

Reversing years of discrimination, and providing a more balanced model for future generations, is a goal of quality education. Executive Order 11246 is a much needed component in this effort.

Sincerely,

MARY HATWOOD FUTRELL,
President.

Mr. EDWARDS. The gentleman from Michigan.

Mr. CONYERS. No statement.

Mr. EDWARDS. The gentlewoman from Colorado.

Mrs. SCHROEDER. Mr. Chairman, the only thing I would like to say is, I had a very interesting experience in August, and I think it frames why I think affirmative action is so important.

On a congressional visit to India, the Air Force had put together a real affirmative action crew on our plane, and many of the Members were snarling at me. We had a woman pilot, we had everything. It was an absolute—it was America in microcosm.

And as things transpired in India, the plane broke down; the entire crew got out, fixed the plane, and got back on. But the whole Indian Air Force on the base was there watching it. And I went over to talk to one of the Air Force officers in the Indian Air Force about why they were all watching this, why did they think that this was so unique.

And they said, "Well, here we are at this time in India with Sikhs shooting Moslems and Moslems shooting Sikhs, and to see this incredible crew of women, blacks, Hispanics, Americans." He said, "It is American power, it is not black power, it is not woman power."

I think we are very proud of where affirmative action brought us, and I think we all know that the Air Force wouldn't look like that if it hadn't been for the outreach that had been made. And I have been dismayed at many people trying to make apologies for it. I honestly think that wouldn't have happened had that pressure not been there. And I think when you see it in the eyes of other countries, where they are still fighting all these incredible battles between groups, we have made terrific progress, and we should be proud. We should stay on that road.

And I commend you for having these hearings.

Mr. EDWARDS. Thank you.

Our first witness this morning is Ralph Davidson, chairman of the board of Time, Inc. Mr. Davidson has been with Time for over 30 years, and became its chairman in 1980. Time, Inc. is a multibillion dollar communications company, and is, of course, the publisher of Time magazine, People magazine, as well as many others.

Mr. Davidson, would you please come up to the witness table. We welcome you. We are delighted that you could join us.

Without objection, your full statement will be made a part of the record, and you may proceed as you see fit.

TESTIMONY OF RALPH DAVIDSON, CHAIRMAN OF THE BOARD, TIME, INC.

Mr. DAVIDSON. Thank you, Mr. Chairman. I see no reason to reread my statement, and you all have it. If I may, I'd just like to summarize some of my comments.

We are in favor of the Executive Order 11246 for two basic reasons:

First, we recognize the use of public funds and contracts are important tools for reaching goals beneficial to our entire society. Certainly, throughout this Nation's history our Government has used public investments to help bring jobs and public opportunity to all our people, wherever they live, whatever their race or religion or ethnic origin. Affirmative action, we believe, is an intelligent part of this commitment.

Second, as a matter of practical experience, we believe that the Executive order works. We think the statistics are clear: the Executive order has increased the proportion of minorities and women in our workforce, and has proved an effective tool in overcoming discrimination.

Certainly that has been Time, Inc.'s experience. Only a relatively small part of Time, Inc.'s business involves Federal contracts, but because of that involvement, we are subject to review by the Federal Office of Contract Compliance. We have had a review recently. No quotas were imposed on Time, Inc. The Office of Contract Compliance reviewed our good-faith effort to increase the employment of minorities and women.

We will continue in our internal operations to follow an affirmative action program, to follow one which we believe has been beneficial to us and helped Time, Inc. to have a greater representation of women and minorities. We believe that that effort could be complicated and called into question by any change in Executive Order 11246, a move that we believe could jeopardize all the hard work

and progress which has been made in both the public and private sectors over the last 20 years.

Some people have called for changes in the affirmative action process to make it fair to small businesses. That seems feasible, but whatever changes or amendments are made to the process, we believe the Executive order should remain as it is.

I say this as a businessman. I have no political axe to grind here today and no partisan philosophy or ideology to make. My involvement with the Executive order is pragmatic. I want to see the competitiveness of our economy strengthened, and new sources and resources of talent and creativity being made available to us to draw on.

I believe the Executive order is helping to achieve this goal. It is opening doors to those who for far too long have been judged not by their ambition or their initiative but by their race or sex. It is telling those who were once excluded that there is a place for their skills and their genius in our economy, and that their hard work will be rewarded.

We should not retreat from that faith in our ability to help people without stifling them. We believe the Executive order should not be changed. It has opened many doors, and let's not slam that door shut.

Thank you, Mr. Chairman.

[The statement of Mr. Davidson follows:]

TESTIMONY OF RALPH P. DAVIDSON, CHAIRMAN OF THE BOARD, TIME INC.

Mr. Chairman and members of the subcommittee, I'm Ralph P. Davidson, Chairman of the Board of Time Incorporated. I've come here today to speak in favor of the retention of Executive Order 11246, which since 1965 has required affirmative action in minority hiring for Federal contractors.

We at Time Inc. believe in Executive Order 11246 for two basic reasons.

First, we recognize that the use of public funds and contracts are important tools for reaching goals beneficial to our entire society. Throughout this nation's history our government has used public investments to help bring jobs and opportunity to all our people, wherever they live, whatever their race or religion or ethnic origins.

Affirmative Action, we believe , is an intelligent part of that commitment.

Second, as a matter of practical experience, we believe that the Executive order works.

Look at the statistics.

According to a 1983 Equal Employment Opportunity Commission survey of some 34,000 companies, the percentage of minority employees in those work forces grew from 12 percent in 1967 to 19 percent in 1983. Similarly, the Department of Labor found that Federal contractors required to comply with Federal affirmative-action guidelines employed 19 percent more minorities and 15 percent more women. The comparable increases for the non-contractors were only 12 percent and 2 percent.

The simple efficacy of this Executive order is widely acknowledged. Republicans as well as Democrats—people from the private as well as the public sector—have endorsed it as a reasonable and workable way of overcoming the lasting effects of discrimination.

Executive Order 11246 is working.

It is helping this country to bring more and more people from the margins of our economy into the mainstream, to see to it that blacks, Hispanics and women have a fair proportion of the opportunities we create, a proportion that so-called "market forces"—by themselves—have never been able to provide.

We at Time Inc., of course, have been less directly affected by this Executive order than some other corporations, which derive a major portion of their business from government contracts.

As you are no doubt aware, Time Inc. is primarily a print, video and entertainment company. Our major product is information. As the largest magazine publishing company in the world, we produce and market magazines such as Time, For-

tune, Life, Sport Illustrated, People, Money and Discover. With the acquisition of the Southern Progress Company this year, we've added Southern Living, Creative Ideas for Living, Classics, and Progressive Farmer to that list.

We're also test marketing in selective areas a new magazine of photo-journalism called Picture Week.

In addition, through Little, Brown, Time-Life Books and Book-of-the-Month Club, Time Inc. is a leading publisher of trade, text and professional books.

In the field of telecommunications, Time Inc.'s Home Box Office is the largest pay-TV programming service in the U.S. Its companion service, Cinemax, ranks third. American Television and Communications Inc., another Time Inc. property, is the second largest cable television system operating company.

Selling Areas-Marketing, Inc. (SAMI) is Time Inc.'s marketing information service.

All together, Time Inc. employs approximately 19,000 people.

Only a small proportion of these businesses are, as I've said, involved with Federal contracts. For example, Time Inc. sells advertising through its New York-based magazines to the armed services. Time-Life Video sells training films to several government agencies. In total this amounts to about $11 million, less than a half of one percent of Time Inc.'s annual revenues.

Because of these contracts, however, Time Inc.'s New York Magazine group and its operations in Chicago were subject to one of the over 5,200 reviews the Office of Federal Contract Compliance (OFCCP) will conduct in FY 1985.

We had no objection to this review. For Time Inc.—as for many other companies—affirmative action is just another management-by-objectives program, something we're used to doing. Goals and timetables are a regular part of our business.

The review that was done was neither intrusive nor accusatory. It wasn't a bureaucratic inquisition, or a "Star Chamber" proceeding.

The Time Inc. employees involved in it found the OFCCP officers to be both flexible and cooperative.

At the end of the review, OFCCP reported our goals and timetables acceptable. We were not held to strict numbers. OFCCP requested more careful record keeping and tracking of applicants and job classifications, suggesting a number of ways to accomplish this. But it left the details to Time Inc. Our personnel officers devised a system, and submitted it by letter for OFCCP's review. It was accepted. All managers were informed of the new procedures and reminded of existing ones.

At no time, I might add, was Time Inc. subject to anything resembling "quotas." We weren't presented with rigid, predetermined statistics for the hiring of women and minorities that we were told we had to meet.

And our experience wasn't very different from that of other businesses and corporations. The emphasis in affirmative action has always been on seeing to it there is a good faith effort to increase opportunities for a part of the work force that has historically been denied them.

OFCCP hasn't tried to dictate a final, inflexible result.

The changes adopted in response to the OFCCP have made our interviewing processes more orderly and left our managers more aware of a wider pool of talent.

In other words, in seeing as much to the spirit as the letter of the Executive order, the OFCCP showed us that even a company such as Time Inc., with a long history of dedication to affirmative action, can improve that policy.

The fact is we appreciated help.

We know that minorities are as underrepresented in journalism and publishing as in other parts of our economy. And apart from any policy of the Federal Government, we at Time Inc. have been working to change the situation.

We've launched the Time Inc. Scholars Program, which is designed to encourage and expand the numbers of journalism students from predominantly minority colleges and universities.

We contribute $100,000 annually for scholarships to those institutions.

Beyond that, we've committed our entire corporation to opening positions to women and minorities. In our 1982 annual report to our shareholders and potential investors we put it this way:

"Equal opportunity and affirmative action continue to be high business priorities at Time Inc. Each of our divisions has specific goals and timetables for achieving a more balanced work force, and we are making steady long-term progress toward those goals. Minority group representation in the company's U.S. operations now stands at 21 percent. The proportion of women is 38 percent. Another gauge of our affirmative-action progress is the proportion of minorities and women in management positions: 9 percent for minorities, 36 percent for women. The company will continue to emphasize employment in high-level positions for both minorities and

women, and, in addition, give special attention to hiring qualified disabled individuals."

That was 1982. Since then we've made further progress. In 1985, the percentage of minority and women who are officials and managers at Time Inc. has increased, respectively, to 13 percent and 46 percent.

As part of my appearance here today, I'm proud to reaffirm Time Inc.'s commitment to affirmative action. Whatever future Federal policy—whatever recommendations this committee decides on—Time Inc. will continue on the course it has set for itself.

Last September, when press reports indicated that Executive Order 11246 might be weakened or watered down, Time Inc.'s President, J. Richard Munro and I issued a statement to that effect to every employee of Time Inc. and its companies.

"Time Inc.," we said, "began a voluntary affirmative action program more than twenty years ago. It has been an important business priority for us ever since. Equal employment opportunity is an integral part of our responsibility to remain a good company and a good employer."

Noting the proposed changes in the Executive order, we concluded that, quote "should this happen, we want to assure you we will maintain our affirmative action program. We have been well-served by that program, including the setting of internal hiring and promotion goals for minorities and women, and we will continue to pursue it assidiously."

And yet, I didn't come here today merely to reiterate Time Inc.'s belief in the essential fairness and feasibility of its own affirmative action program. We can and will follow our own corporate conscience. But the ultimate success of this nation's attempt to overcome the widespread legacy of centuries of discrimination and legally-sanctioned inequality requires something more than the good will of selected businesses and individuals.

It requires that we as a people—as a government—use our common resources equitably and effectively, that we admit a shared obligation to undo the deep and persistent damage done by discrimination.

Executive Order 11246 has helped us to do that.

It has brought a new level of involvement by minorities and women in our economic life, assuring them a fairer share of the contracts and opportunities created by the use of public monies than they would have had otherwise.

It has been upheld by Congress and the courts. The National Association of Manufacturers supports it. Local governments around the country have used it as a model for their own affirmative action programs. As a matter of fact, the Republican Mayor of Indianapolis, Richard Hudnut, recently stated that even if his city were allowed to dismantle its program, it would choose to retain it.

"We don't live in Utopia," Mayor Hudnut said. "Ideally, everybody in society should be color-blind. But that isn't the way it works."

For two decades, there has been a wide consensus on this Executive order. And it's ironic, I suppose, that the current proposals for revising it come despite rather than because of that consensus.

I don't mean to imply that the entire process of affirmative action is written in stone so no word or comma can be changed. Certainly, if the problem surrounding current regulations is the complexity of record keeping for smaller companies or confusing or duplicative jurisdictions, then they should be changed.

Maybe the rules governing a company's control of subcontractors or vendors could be simplified. Perhaps *de minimus* exemptions could be indexed for inflation. But the Executive order shouldn't be changed. It's sensible public policy, sound business practice and it's helping us come closer to the goal of equal opportunity that we all agree this country should be continually trying to reach.

And it seems to me that before we allow this Executive order to be changed and vitiated so that it's an empty piece of paper, we should at least be clear that what would be affected would be more than just a single Federal policy.

Other affirmative action programs would be subject to increasing resistance. State and local programs modeled on the Federal example would undoubtedly be challenged. Some would probably be dismantled, others rendered ineffective.

And while companies like Time Inc. that do business in all fifty states would remain committed to their internal programs, they could find themselves facing a profusion of state and local programs, each with their own regulations, many—if not most—in conflict with Federal standards.

The bottom line is that with any change in this Executive order we would be opening the way for the slow unraveling of all the hard won progress of the past two decades. We would be depriving ourselves of one of the few proven and tested

means we have for increasing the participation of women and minorities in our economy.

I say this as a businessman. I have no political axe to grind here today, no partisan philosophy or ideology to advance.

My involvement with the Executive order is pragmatic. I want to see the competitiveness of our economy strengthened and new resources of talent and creativity made available for us to draw on.

I believe the Executive order is helping us achieve this goal.

It is opening doors to those who for far too long have been judged not by their ambition or initiative but by their race or sex.

It is telling those who were once excluded that there's a place for their skills and genius in our economy, that their hard work will be rewarded.

We should not retreat from that faith in our ability to help people without stifling them.

The Executive order should not be changed.

The door should not be closed.

Thank you.

Mr. EDWARDS. Thank you very much, Mr. Davidson. Because we have quite a number of witnesses today, the Chair will enforce the 5-minute rule.

The Chair recognizes the gentleman from Michigan, Mr. Conyers.

Mr. CONYERS. I want to thank you for your testimony, and encourage the understanding that your magazines spread in America by reporting on matters of racial progress and also matters of racial setbacks. They do it in a way that I think is very instructive to the American people. I commend you for it.

This question about goals, timetables and quotas, which seems to be where all of this is heading, has been a semantical one, and it also has been, Mr. Davidson, a substantive one. In other words, when we talk about automobile imports, quotas are perfectly OK. But, it is verboten when you talk about race relations, for reasons that puzzle me.

In the business world, quotas are an acceptable part of business vocabulary. Do you have any views that would help us as we unravel this part of our examination of Executive Order 11246?

Mr. DAVIDSON. Mr. Conyers, we do not support definitive quotas in terms of affirmative action. We believe that would set up the kind of situation that we would find very difficult, from a business point of view, to handle.

However, our business operates on goals. We set budgets for everything we do in our company, and to have goals in terms of diversity within our workforce seems to us a sound business practice. So we will continue to support the goal effect of affirmative action, but—we are opposed to a specific quota system, and that certainly has not been our experience in our review by the Office of Contract Compliance. We have not been subject to that kind of review.

Mr. CONYERS. Thank you.

Finally, do you believe that, perhaps to allow or accommodate small business interests, and survival of smaller size activities in the workplace, that we might do it in another way, or with some other legislative or Federal method, rather than tampering with an Executive order about affirmative action?

Mr. DAVIDSON. Well, I believe that the Executive order should stand as it is.

There are ways to change the regulation to take into account that—there are businesses which are too small to be able to handle

the bureaucratic workload. We ought to be able to do something about that. I think that there are some de minimus regulations now on the books, and maybe those should be looked at.

It certainly seems to be within the ability of these regulation, of this Executive order, to recognize that there is a diversity of businesses, and that this Executive order ought to be tailored to meet the different size businesses that are involved. That to me doesn't seem like a huge problem.

But I would not tamper, as I have said in my testimony and as we as a company believe, with the Executive order itself.

Mr. CONYERS. Thank you, Mr. Chairman.

Thank you, Mr. Davidson.

Mr. EDWARDS. The gentleman from Wisconsin, Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Recently the U.S. Civil Rights Commission issued a report, and one of the Commissioners, Mary Francis Berry, in a dissent stated, and I quote:

> Civil rights were not passed to give protection to all Americans, as the majority of this Commission seems to believe. If we are ever to achieve real equality of opportunity, in this the bright hope and promise of America, we must not deny our history and present conditions by substituting illusion for security.

Just so that I know where you are coming from, do you agree with this statement, and do you agree that it is an illusion to believe that civil rights laws were passed only to protect some Americans at the expense of others?

Mr. DAVIDSON. No, I think civil rights apply to all Americans.

Mr. SENSENBRENNER. Uh-huh. So you——

Mr. DAVIDSON. I don't know the context in which Ms. Berry made that assertion, but I'm not going to speculate on it. But I do believe that rights do apply to all Americans, indeed.

Mr. SENSENBRENNER. Well, I am glad that you made that statement, because some of my colleagues who have defended the Executive order on this subcommittee have been defending Ms. Berry's statement.

Second, I quoted Justice Stevens rather extensively in his dissent in the Fullilove case, where he says "the ultimate goal must be to eliminate entirely from a Government's decisionmaking process such irrelevant factors as a human being's race." And as a way of citing his discomfort with the way that this Executive order has been implemented, he cited the Reich Citizenship Law, which Hitler passed on September 15, 1935, where certain select categories were given protections under German law.

Do you see any merit in the Justice's contention?

Mr. DAVIDSON. I certainly am not going to get into a debate on what the Justices used as their legal rationale for the examination, so far, they have made of this Executive order, but I would have to say that I would side with the majority of the Court as to where they've come out on it, and not take on any individual Justice's point of view.

Mr. SENSENBRENNER. So, in other words you favor the opinion in *Stotts* v. *Firefighters' Local*, wherein the Court limited the relief to just actual victims of discrimination rather than people in a class who might not have been an actual victim of discrimination.

Mr. DAVIDSON. Now you are asking me to comment on a Court case which I am only superficially familiar with, but our point is that, to date, the times that affirmative action regulations have been tested by the courts, they seem to have come out on the side that says that these regulations and this Executive order is lawful. And I would support that point of view of the Court.

Mr. SENSENBRENNER. Well, the major bone of contention on this issue is whether or not the existing Executive order should remain, or whether it should be changed. The Justice Department's draft specifically allows the voluntary use of numerical goals and timetables, so long as they don't discriminate.

What's wrong with allowing the voluntary use of goals and timetables, particularly when you're dealing with a small business that has to deal with these regulations and figures that going the quota route is the easy way out to avoid litigation? So, what's wrong with making them voluntary?

Mr. DAVIDSON. Well, we believe that there is a need in the country for more attention to be paid to the equal opportunity employment, and if voluntary measures had worked over the years, then I assume we would have had them voluntary. But it was evident in this country that we needed to take a firmer look and a firmer stand on the tapping of a broader pool of the work force, and that there were a lot of people in corporations, large and small, including my own, who had fixed views on what kind of people should fill particular jobs. We think that the affirmative action program has broadened their point of view, has broadened the labor pool, and has served our company by bringing into the work force people that have heretofore been excluded.

Mr. SENSENBRENNER. Well, I really question whether the labor pool has been broadened as a result of this Executive order. I think it has been broadened due to us breaking down the barriers of discrimination in education, so that there are more qualified people in the work force of minority groups and women and other groups, so that there would be more of them who could peddle their wares to employers and get hired.

Finally, recognizing that Time, Inc. is one of the largest corporations in the country, and you probably are able to have more people at your disposal to comply with regulations, I would just hope that you would stay around for the testimony of the Associated Builders and Contractors, which is a coalition of a lot of very small corporations. One of the complaints that they have made with the regulations surrounding the Executive order is that a contractor must do 40 separate things; which time does not permit me to outline, but the failure to document just one step can result in a finding of noncompliance. To me that seems to be an excessive burden that is placed on small business that is less able to absorb the paperwork burden that the ABC will be outlining, than a large corporation like yours being able to absorb that burden.

Would you agree with that?

Mr. DAVIDSON. Congressman, as I said earlier, if there are regulations which are damaging to small businesses, then something ought to be done about the regulations. On the surface it sounds to me like 40 steps are excessive. I would agree with that. Something can be done about it.

And, yes, I agree with you, Time, Inc. is better able to handle this problem than a company which employs 20 people.

Mr. SENSENBRENNER. Thank you very much, Mr. Chairman.

Mr. EDWARDS. Thank you, Mr. Sensenbrenner.

Mrs. Schroeder.

Mrs. SCHROEDER. Mr. Chairman, there was a Department of Labor study done in 1983 comparing companies under the Executive order and companies outside the Executive order and how the hiring had been different. In other words, it shows that the Executive order had made a very significant difference in broadening the labor pool, in advancement, and so forth.

Are we going to put that in the record? Because I think it is very important to counter—I don't have it with me, but I think it should be part of the record to counter some of the——

Mr. EDWARDS. Counsel advises me that it is available, and——

Mrs. SCHROEDER [continuing]. Information that the gentleman from Wisconsin——

Mr. EDWARDS [continuing]. Without objection will be made a part of the record.

Mrs. SCHROEDER. Thank you.

[The study "The Impact of Affirmative Action" by Jonathan S. Leonard, is held in the subcommittee files.]

Mrs. SCHROEDER. Mr. Davidson, I certainly want to thank you for being here, because I think you're hitting some of the things that affirmative action deals with. I mean, we could have done this voluntarily for 100 years after the Civil War, and we didn't, and finally President Johnson put it into effect in 1965. The Department of Labor and everyone else has documented that it has made a phenomenal difference for women and for minorities in moving them into positions that a lot of people thought they couldn't do.

I was fascinated by your testimony, because I think you admitted something most of us hate to admit, and that is that all of us have some kind of stereotype and we have to constantly work to break that down. And that may have been one of the real inhibiting factors before the Executive order.

But my question would be—you're on other boards, too, and I know you must talk to lots of people in the business community—let's talk about how this Executive order has worked. That's something we know about, and we don't need to go into Supreme Court decisions, and who we agree with, and who we don't.

But, this Executive order and how it works—when they come into a company, do they say, "OK, Time, Inc., you serve all of America. In America there are 51 percent female, 12 percent black, or whatever the figures are, so many Hispanic, and we want your work force to look like that in 3 months?" Do they bring that quota system in and do that?

Because that is what we keep hearing that this does, and I think in a lot of people's minds they think that that is what the Executive order does.

Mr. DAVIDSON. Well, again, I can only speak for Time, Inc. We have just completed this review, and, No. 1, there was noncompliance in something like eight or nine categories, which meant that, from the point of view of the office that looked at it, that these were things that we were asked to try to correct.

They do take a look at the work force of Time, Inc., and how we are doing in terms of the hiring of minorities and women, and if there is a glaring omission, why, they encourage us to correct it. But it is not done through the use of quotas.

Now, I said it takes a certain amount of time. I can't tell you exactly how many man-hours we worked on it. There are two people in the company—two. We have a work force of 19,000, and we have 2 people who spend a good deal of their time on this problem.

Mrs. SCHROEDER. But not all of their time?

Mr. DAVIDSON. But not all of their time. No; they spend a good deal of their time when we are under review, the rest of the time they have other personnel functions———

Mrs. SCHROEDER. Sure.

Mr. DAVIDSON [continuing]. That they are carrying out.

Mrs. SCHROEDER. Did you have to fire anybody, and immediately replace them?

Mr. DAVIDSON. No.

Mrs. SCHROEDER. In other words, it is the goals and the timetables message, they say, this should be a goal, this is where you should be going, and this is a reasonable time. Isn't that how it all works?

Mr. DAVIDSON. That's how it has worked with us, and we have made significant changes in the look of our work force.

Again, I wish to emphasize that the people that are in those jobs are qualified people, and the ones who get promoted are qualified, and the ones who don't make it are no longer in the work force, and———

Mrs. SCHROEDER. And in your experience, you haven't heard anything different from other companies? I mean, other companies haven't come in and and been hit with a quota. Has it been kind of the same process for other companies from your information?

Mr. DAVIDSON. Oh, I've heard some grumblings of the kind that Mr. Sensenbrenner talked about, that sometimes it looks like there are rules and regulations there that seem kind of silly, and———

Mrs. SCHROEDER. But the Executive———

Mr. DAVIDSON [continuing]. I'm sure there are.

Mrs. SCHROEDER. Sure. And the executive branch can deal with that through regulation.

Mr. DAVIDSON. Yes.

Mrs. SCHROEDER. Yes; so that's really fairly simple.

The other thing that we hear from so many people as a we talk about this is that it is impossible for companies to find qualified minorities and women.

Has that been a problem for Time, Inc.?

Mr. DAVIDSON. We believe that there is underrepresentation in the field of journalism of minorities, and I think that it has been true that we have not—that the work pool there has been insufficient in our judgment, and we're doing something to correct that. We have a scholarship program that we fund to help train more minorities in journalism, so, yes, in that narrow field, in our company, we haven't found enough qualified people.

Mrs. SCHROEDER. But your company doesn't resent doing that?

Mr. DAVIDSON. Well, we think it'll strengthen the field of journalism, and that's the business that we're in. We would like to see it, in all aspects, a better one.

Mrs. SCHROEDER. Again, I thank you very much. I think your testimony has been very courageous. It is much easier to swim with the mass than take a dive under the table, and we appreciate you and Time, Inc., coming forward and being aggressive about how America should look like America.

Mr. EDWARDS. The gentleman from Ohio, Mr. DeWine.

Mr. DEWINE. Thank you, Mr. Chairman.

Mr. Davidson, thank you very much for testifying this morning. I wonder if you could get into the specifics a little bit about your situation. In your testimony you stated there were nine different areas that you say you were not in compliance. Could you give us a couple of examples?

Mr. DAVIDSON. To be honest with you, I don't have that information. I was—I asked the question, were we in noncompliance, and somebody said, yeah, there were eight problems; and I don't know what specifically they are.

Mr. DEWINE. OK. And this was as of—was this a recent——

Mr. DAVIDSON. This was conducted in December and January, December 1984 and January 1985.

Mr. DEWINE. Because what I was trying to identify an area where there was a problem, and see what the problem was, and what you did to rectify it. This would be of benefit to the committee, or at least to this member of the committee, to see how this Executive order is actually being applied, and how it works out in the field.

Mr. DAVIDSON. Let me just cite a couple of statistics which may help you with that. As of the end of 1982, the minority representation in our U.S. operations—we had 21 percent were minorities, and the proportion of women was 38 percent. In 1985, those have both increased slightly, but the percentages of minorities and women who are officials and managers has increased substantially. We had 9 percent minorities in management positions and 36 percent women; today we have 13 percent in management positions who are minorities, and 46 percent who are women. So that has been the record of Time, Inc. I wouldn't say that that has been done only because there has been an affirmative action Executive order that we are following, but certainly it has been encouraged because we are supporters of that Executive order.

Mr. DEWINE. In your testimony you state:

> Time, Inc. will continue its own internal affirmative action program which has helped us achieve greater representation of minorities and women. But that effort could be complicated and called into question by any change in Executive Order 11246, a move that could jeopardize all the hard-won progress made, both in the public and private sectors, across the past two decades.

I am just curious what that means, and, assuming that there was some change in the Executive order, why that would necessarily mean that you would have to change your policy.

Let's assume that it was from, maybe from your perspective, made easier for a company, or that there was less monitoring, or a movement away from some emphasis on quotas, and let's just say

there was some change. Why would that mean that Time, Inc. would have to change, and why would it cause all these problems?

Mr. DAVIDSON. Well, one takes a look at it, and that there is a Federal regulation, an Executive order, now which covers the area, the United States where we do business—one could envision that, if this were changed dramatically, you might then have to deal with 48 or 50, or whatever, current laws passed in the various States—I don't know how many are on the books right now, but there are a considerable number—and it would, in our judgment, in anticipation of what might happen, complicate our lives even more so than they are today, if you had to start worrying about——

Mr. DEWINE. Well, I have——

Mr. DAVIDSON [continuing]. An incredible array of State and local regulations.

Mr. DEWINE. Well, you may be correct. I would suspect that there is some—that we're dealing with a preemption area, and that unless there was a great change in the Executive order, that you would still be subject to the Executive order.

I guess my point is that there is nothing to stop you from voluntarily doing any of this anyway.

Mr. DAVIDSON. Not anything whatsoever, and, as we said in our testimony, even if the Executive order is done away with, or changed dramatically, it is the policy of our company to continue to pursue this policy.

Mr. DEWINE. And I guess that's why, and I don't want to argue with you, and I'll just let it go at this, because I know my time is up. But I don't understand, based upon that testimony, your statement in your written testimony in the fourth paragraph that "any change"—and the emphasis is mine, I'm putting——

Mr. DAVIDSON. Yes, yes.

Mr. DEWINE [continuing]. On the word "any"—"any change in Executive Order 11246, a move that could jeopardize all the hard-won progress made, both in the public and private sector," and that your life would be—that effort could be complicated and called into question by any change in that order.

I don't understand. I still don't understand that statement.

Mr. DAVIDSON. Well, I won't argue that it could be confusing, and perhaps we should have spelled out how, if it were changed as the administration was looking at changing it—it would complicate our lives. I can understand that there might be some changes made in the regulations that would make our lives easier, so perhaps we could have written that better, Congressman.

Mr. DEWINE. But you're——

Mr. DAVIDSON. I won't argue with you on that.

Mr. DEWINE [continuing]. The bottom line is that you're going to continue to do basically what you're doing now anyway.

Mr. DAVIDSON. Yes, sir.

Mr. DEWINE. As far as Time, Inc. is concerned.

Mr. DAVIDSON. That is correct.

Mr. DEWINE. Thank you, Mr. Chairman.

Mr. EDWARDS. I have just one quick question, Mr. Davidson.

You have been at Time, Inc., a long time, more than 30 years. Do you think that you have a better company because of affirmative action?

Mr. DAVIDSON. Yes, I think we do. I think we have a more diverse company.

We believe strongly that if you have a good, strong community, a viable community where you do business, that your business is going to profit from that. And that's why we are involved in our communities, and in all kinds of activities. We're not an eleemosynary institution, and we do have a high profit motive. Yet we believe that, by giving some of that back to our communities, it is going to strengthen our company in the long run, and be better for our employees, and give us the opportunity to have the kind of workforce that we are struggling to get a hold of.

Mr. EDWARDS. And better for the country, too.

Mr. DAVIDSON. Yes, sir.

Mr. EDWARDS. Thank you, Mr. Davidson.

Our next witnesses are William L. Robinson, director, and Richard T. Seymour, director of the employment discrimination project, of the Lawyers' Committee for Civil Rights Under Law. The Lawyers' Committee has had a long involvement with Executive Order 11246 and affirmative action, and it has always been a great help to this subcommittee.

Mr. Robinson and Mr. Seymour, welcome. You may proceed.

TESTIMONY OF WILLIAM L. ROBINSON, DIRECTOR, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, ACCOMPANIED BY RICHARD T. SEYMOUR, DIRECTOR, EMPLOYMENT DISCRIMINATION PROJECT, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

Mr. ROBINSON. Thank you, Mr. Chairman and members of the subcommittee, for the opportunity to be with you this morning to discuss with you the important issues concerning proposed modifications of the Executive order.

I take it that my statement will also be entered in the record in its entirety?

Mr. EDWARDS. Without objection.

Mr. ROBINSON. And thus I, too, can proceed to summarize the testimony, rather than repeat it in all its detail.

Mr. EDWARDS. Yes.

Mr. ROBINSON. I want to begin by reminding you that the program we talk about here this morning is the program that seeks to enforce nondiscrimination on the part of Government contractors.

Companies who do business with the Government are an important part of the economy. Government contracts account for many millions of dollars of business, and the companies, pursuant to their Federal contracts, employ many thousands of employees. The Government contracting business is important for reasons that go beyond the sheer number of dollars and numbers of employees.

Government contracting is important to our country and our economy in other ways, as well. For example, then, the initial impetus to nondiscrimination by non-Government contractors began as part of the defense effort during World War II. I don't think

anybody would question that it is important that there be nondiscrimination in Government contracting, and that, moreover, that our Government take the lead in eliminating discrimination in employment, and that, in part, it would take that lead with respect to Government contracts.

Thus, we have developed over the years a program for assuring nondiscrimination by Government contractors. I want to take a couple of minutes at the outset to remind you what that program entails.

Basically, what it requires is that a contractor first take a look at, do an evaluation of, its work force, and, if it finds that there is a significant disparity between the numbers of minorities or women that it hires, as compared with their availability in the qualified work force, then that contractor must engage in affirmative action. That contractor must undertake, in good faith, to eliminate that significant disparity by the adoption of goals and timetables to bring its work force into line with the availability of qualified workers.

That program, as a matter of fact, has obtained widespread support, support from business, support from unions, support from the general population as a whole. Thus, one of the questions you might ask right at the outset is, why the proposal for change?

Among the various assertions for change are those that assert the following: that goals and timetables have operated as ceilings imposing an artifical maximum on minorities, and female hires, and promotions; or, that goals and timetables are indistinguishable from quotas; or, that a program of voluntary compliance by employers would be sufficient; or, that the Government should not even be allowed to look at an employer's statistics to determine whether it is complying; or, that employers which reach their own voluntary system of goals and timetables should be put in fear of potential lawsuits if they continue to do so on their own.

I want to take a look at a couple of those assertions and make comment on them.

First, the assumption that minorities and women fare worse with employers that are Government contractors. I want to just say pointblank that our information is directly the contrary. There have been four recent studies. I cite them in the testimony, and won't go into them in detail now, but they do provide us with what is the available study of the basic data. They all conclude that Government contractors do better with respect to providing employment opportunities for minorities and women than non-Government contractors.

The conclusion reached by all those who've studied the data, then, is that the operation of the Executive order, and its enforcement program, has been a positive boon to equality of employment opportunity, and greater employment opportunity for minorities and women.

Second, the assertion that the program doesn't help those who need it most. In our experience in litigating cases, we found that many poor and disadvantaged persons have been helped, and that, in the hands of willing and capable administrators, the program has had, and can have, great effectiveness.

Let me refer you specifically to the textile industry. For many years in the textile industry there was a pattern of employment wherein the industry hired essentially white males and white females for the more desirable jobs, black males for the less desirable jobs, and did not hire black women at all. In late 1968 and 1969, when the Government began paying closer attention to that industry, it became clear that textile mills' compliance would be determined by their success in hiring black women, and that mere protestations of good faith efforts would no longer be sufficient.

As soon as this lesson sank in, textile companies across the South began hiring black women in growing numbers. Many white textile workers had only elementary school education. It is in the nature of the textile mills that dexterity is far more important to production than formal education. Accordingly, many of the black women hired in the late 1960's as a result of this affirmative action also had only elementary school educations. For many it was their first factory job, and their first job paying the minimum wage.

It is a very clear example, then, that the enforcement activities under the Executive order produced positive change on behalf of many of the people who needed help the most.

Myth No. 3: The assumption that the Executive order program requires quotas instead of goals, or that there is no difference between quotas and goals, and provide only for good faith efforts to reach reasonably attainable goals.

I want to particularly invite you to look at page 15, footnote 25, which repeats the specific pointblank, black and white language saying that quotas are not part of the requirements of the Executive order or the regulations here. I really don't think there is any room for doubt that the Executive order nor the regulations require any modification whatsoever to make clear that they do not intend to require quotas, that quotas are not required, quotas are not a part of the law enforcement effort as it is set forth in the Executive order or the regulations that seek to implement that order.

The assertion that there is no meaningful difference between goals and quotas overlooks the fact that the Supreme Court itself has distinguished between rigid and inflexible ratios, and flexible targets, or goals, and has struck down the former while approving the latter. I refer you particularly to the Court's decision in the *Bakke* case, and to the Court's decision in the *Weber* case.

In the *Weber* case the Court approved the plan because it was designed to break down old patterns of racial segregation and heirarchy, did not unnecessarily trammel the interests of white workers, did not require the discharge of white workers, and their replacement by blacks, did not create an absolute bar to the advancement of whites, and was temporary. The hallmark of a goal, rather than a quota, is indeed its flexibility.

Let me add one more point. From my experience as associate general counsel for the Equal Employment Opportunity Commission for the years 1973 through 1979, during those years I had the opportunity personally to review hundreds of affirmative action programs from companies all across the country. What I observed was that there was not some uniform lock-step compliance. To look at an employer, in some jobs, they would be higher. In some jobs,

they would be about on target. In other jobs, they would fall far short of the goal. In evaluating their performance, it was my experience that what you did was you looked, then, not merely at the numbers, but also at the underlying reasons as to why they were able to have success in some instances, and why they fell short of their goals in others.

Myth No. 4: The assumption that there is no further need for affirmative action. Let me quickly join the chorus of people who assert that our country has indeed made great progress in recent years. But, let me also assert that much more needs to be done to assure that opportunity exists at all levels.

The majority of women and minorities remain concentrated in low-paying, low-status occupations, or are disproportionately unemployed. The Lawyers' Committee, as well as the rest of the country, looks forward eagerly to the day when true equality of employment opportunity exists, and it will no longer be necessary to have any race or gender conscious preferences. That day has not yet arrived, and its arrival will be delayed, not advanced, by a turning of the Government's back away from the only kinds of programs which have proven effective.

In my prepared testimony I set forth a summary of the history of the current Executive order; I don't want to repeat that history this morning. I merely want to make a couple of points: that is, that that history is a history which demonstrates that voluntarism simply did not work. Over a number of years it became evident that positive action, indeed affirmative action, was required, and, indeed, even the history of affirmative action made clear that mere exhortations were not enough. There had to be a program with details and specifics contained in it in order to achieve real progress.

Let me then turn to the specific changes that have been more——

Mr. EDWARDS. Mr. Robinson, we are going to have to move along, so if you can sort of wind it up. We do want to hear from Mr. Seymour, too.

Mr. ROBINSON. Yes, well, then, let me simply turn it over to Mr. Seymour and let him speak to the details. Let me just give you my conclusion.

My conclusion, simply stated, is that the Executive order program has historically been the Government's greatest weapon against job discrimination. I don't mean to contend that there have been no problems with respect to its enforcement; there have. There have been. But on the other hand, Secretary Brock, and the other people that he has brought into the program with him, are people of good will and great talent. We at the Lawyers' Committee pledge to work with Secretary Brock, and Director of OFCCP, Joseph Cooper, in eliminating those difficulties those problems, so that implementation of the Executive order can go forward vigorously, producing much greater employment opportunity in a true, fair manner.

Mr. EDWARDS. Thank you very much, Mr. Robinson, for a really splendid statement. I have read your full statement. It is very valuable.

Mr Seymour.

Mr. SEYMOUR. Thank you, Mr. Chairman.

There are just a couple of broad themes that I'd like to sound.

The first is, we cannot forget, in discussing the Executive order program, that it is not the function of the program to call any employer a discriminator. The genius of the program, its whole spirit, is to identify problems at an early stage, thus, the reference to potential disparities, potential deficiencies, and take care of them without the employer having to call itself a bad name, without the Government having to call the employer a bad name.

What that comes out to we can see in the employment discrimination lawsuits that we bring. Those defendants in our cases that are Government contractors—we have often found findings of discrimination that were not reached by the program—but the scope and depth of the discrimination found by the Court is generally quite a bit less than it is when the contractor—when the employer is not a Government contractor, and has not been subject to the program.

A couple of months ago we provided testimony before another congressional committee on the subject of affirmative action programs for Federal agencies. They are not subject to these requirements, and the kinds of practices that we find in our Federal sector lawsuit against various departments and agencies are far worse than you find today at most major national companies. The difference is that with Federal agencies there is really no one looking over their shoulder, requiring them to pay attention to problems at an early stage.

There are two major flaws that we see in the proposed option 1 that has been discussed in the press as an item that may be presented to the President.

Option 1—Let me backtrack a moment.

The Executive order program, in one form or another, has been in existence for 44 years now. It has been effective only during the periods of very tight labor market, during World War II, and when President Nixon shifted the emphasis of the program to the results.

In the past, in the 30 or 30 years before President Nixon made that change, the Executive order program did not accomplish very much. Employers simply signed broad pledges not to discriminate. No one looked at actual results.

If you had an employer who hired a thousand persons a year, every person it hired was a white male, and that went on for 10 years, the Government simply did not consider that. Under President Nixon, that changed.

The option 1 that has been presented would allow, as reported in the press, would allow the Labor Department to look at what a contractor actually does only for the purpose of starting an inquiry. It would be barred expressly from looking at the actual results of the contractor's hires in determining whether the contractor was in compliance or not. So, that hypothetical employer hiring a thousand white males, and no one else, per year, it may be in a 50-percent minority area, it doesn't matter, the Government would still have to give that contractor the seal of approval as long as the contractor did not engage in some blatant, direct form of discrimina-

tion, like a sign on the door, "No Blacks Wanted," or "Women Should Not Apply."

The second problem is that one of the legs on which employers can now rely in defending themselves from reverse discrimination lawsuits is their participation in the Executive order program. One of the reasons we have voluntary programs by employers that produce such progress is because they feel legal safety in having these programs, under the *Weber* case and the Executive order program.

If the Executive order is changed so that these programs are no longer required by the Government, one of the legal bulwarks shielding them from potential liability in reverse discrimination lawsuits is taken away. The Justice Department has touted its proposed language in this option 1, saying that nothing in this change is going to forbid an employer from having an affirmative action program, but the public relations spokesman for the Justice Department has announced that, if they get their change, they may well join in reverse discrimination lawsuits challenging those employers that dare to take that option.

What the administration—some administration officials, and we're glad that it's not the administration as a whole—but what some officials has proposed is that the whole rug be pulled out from underneath the program, and then, who knows what it is going to be like. The remnants of the program may be like the remains of the earthquake in Mexico City. But we submit that there should not be far-reaching changes without any demonstrated need. There is no demonstrated need.

We submit further that, to the extent that the Justice Department is relying on its very, very broad interpretation of the *Stotts* case, an interpretation that has now been rejected by five of the courts of appeals in this country, the recent development have informed seven courts of appeals in the country—the Supreme Court is going to be deciding this term a trilogy of cases that are going to go far in defining the scope of permissible affirmative action: the *Wygant* case, argued yesterday, the *Sheet Metal Workers'* case, which I understand is going to be argued in January, and the *Vanguards of Cleveland* case.

When these decisions come down, there will be a much greater body of law that can inform any future changes in Government policy. We submit that simply prudence dictates that the administration stay its hand until it has the benefit of further guidance from the Supreme Court, especially since one of the thrusts of its arguments that there must be change is its reliance on the *Stotts* case, and to date not one single Federal court in the country has agreed with its interpretation of the *Stotts* decision.

Mr. EDWARDS. Thank you very much, Mr. Seymour.

[The statement of Mr. Robinson and Mr. Seymour follows:]

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 400 • 1400 EYE STREET, NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 371-1212

CABLE ADDRESS: LAWCIV, WASHINGTON, D.C.

BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE HOUSE COMMITTEE ON THE JUDICIARY

November 7, 1985

STATEMENT OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW ON THREATS TO THE PROGRAM, UNDER EXECUTIVE ORDER 11246, OF ENSURING NONDISCRIMINATION BY GOVERNMENT CONTRACTORS

Table of Contents

	Page
A. Introduction	1
B. The False Assumptions Underlying the Arguments for Drastic Changes in the Program	5
1. Myth No. 1: The Assumption that Minorities and Women Fare Worse with Employers Which Are Government Contractors	5
2. Myth No 2: The Assumption that Affirmative Action Benefits Only the Most Skilled and Most Employable Minorities and Women Who Do Not Really Need Help in Getting Hired, and that the Program Does Not Help Those Who Need it Most	12
3. Myth No. 3: The Assumption that the Executive Order Program Requires Quotas Instead of Goals, Or That There is No Difference Between Quotas and Goals	14
4. Myth No. 4: The Assumption that There is No Further Need for Affirmative Action Programs	18
C. The History of the Executive Order Program	19
1. The Early Days -- 1941-1968	19
2. The Philadephia Plan: 1969	23

	Page
3. Order No. 4 - Extension of Goals and Timetables: 1971	25
D. The Executive Order Program Has Gained Broad Public, Judicial, and Congressional Support	25
E. The Weakening Changes Proposed by Some	28
1. Elimination of Goals and Timetables	29
2. Barring the Use of Statistical Evidence	29
3. Limiting the Types of Discrimination Covered	30
4. Disincentives to Voluntary Action	31
5. The Reported "Compromise" or "Option" Language	33
6. The Consequences of Making the Proposed Changes	34
F. The Importance of Relying on Statistical Evidence	36
G. Conclusion	38

LAWYERS' COMMITTEE
FOR CIVIL RIGHTS UNDER LAW

SUITE 400 • 1400 EYE STREET NORTHWEST • WASHINGTON, D.C. 20005 • PHONE (202) 371-1212

CABLE ADDRESS LAWCIV WASHINGTON D.C.

BEFORE THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS
OF THE HOUSE COMMITTEE ON THE JUDICIARY

November 7, 1985

STATEMENT OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW ON THREATS TO THE PROGRAM, UNDER EXECUTIVE ORDER 11246, OF ENSURING NONDISCRIMINATION BY GOVERNMENT CONTRACTORS

By

William L. Robinson[1]

and

Richard T. Seymour[2]

Mr. Chairman and Members of the Subcommittee:

Thank you for the opportunity to testify before you on the threats to an effective program of ensuring that government contractors do not discriminate in their employment practices against women and members of minority groups.

A. Introduction

The Lawyers' Committee is a nationwide civil rights organization, with local offices in Washington, Philadelphia, Boston, Chicago, Jackson, Denver, Los Angeles, and San

---

[1] Director, Lawyers' Committee for Civil Rights Under Law, 1400 'Eye' Street, N.W., Suite 400, Washington, D.C. 20005.

[2] Director, Employment Discrimination Project of the Lawyers' Committee for Civil Rights Under Law.

BEST COPY AVAILABLE

Francisco. It was formed by leaders of the American Bar in 1963, at the request of President Kennedy, to provide legal representation to blacks who were being deprived of their civil rights. Over the years, the national office of the Lawyers' Committee and its local offices have represented the interests of blacks, Hispanics, and women in hundreds of class actions in the fields of employment discrimination, voting rights, equalization of municipal services, and school desegregation. Well over a thousand members of the private bar, including former Attorneys General, former presidents of the American Bar Association, and other leading lawyers, have assisted us in these efforts.

The Federal government expends many billions of dollars a year to obtain necessary goods and services. For many contractors, their business with the Federal government constitutes a major source of their profits; for some contractors, virtually all of their business comes from government contracts. In a number of cases, the relationship between the government and its contractors is closer than ordinary commercial relationships. The widespread use of "cost-plus" contracts, in which the government contracts to assume all risks of the undertaking and to guarantee a particular profit level, is a form of subsidy. The government's bail-out of Lockheed several years ago, in order to ensure that Lockheed would continue to be able to perform its defense contracts, is another indication of the closeness of the government's relationship to some of its contractors.

It has long been accepted by both Republican and

Democratic Presidents and Congresses that government contracts provide enormous opportunities for employment, and that the government has a direct interest in ensuring that the employment benefits resulting from government contracts be made available to a fair cross-section of the workforce. For this reason, government contractors were required to pay their employees regional minimum wages even before passage of the Fair Labor Standards Act of 1938 required the payment of a nationwide minimum wage.[3]

The nondiscrimination requirements and affirmative action requirements of Executive Order 11246 and its predecessors have had substantial bipartisan support over the more than forty-four years since President Roosevelt signed the first executive order banning employment discrimination by defense contractors.[4] While President Johnson signed E.O. 11246, the major credit for making it effective belongs to President Nixon and his Administration. Under the Nixon Administration, the system of goals and timetables responsible for much of the progress in the employment of minorities and of women over the last fifteen years first took shape. The present program of enforcement was basically set by that Administration, and today virtually all persons affected by the program---business, labor, minorities and women---recognize the program as an indispensable aid to ensuring equal consideration of minorities and of women for types of jobs formerly held

[3] The requirement was imposed in the Public Contracts Act of 1936, 49 Stat. 2036, and was upheld in Perkins v. Lukens Steel Co., 310 U.S. 113, 84 L.Ed. 1108 (1940).

[4] Executive Order 8802, described at pp. 19-20 below.

BEST COPY AVAILABLE

only by white males.

While disputes will always arise over the details of the program's implementation and its effectiveness, such disputes have generally been limited to details, and have not gone to the program's core. Until a few months ago, no one---not business, not labor, not minorities, and not women---questioned the need for the program's continuation. Against the united opposition of everyone affected by these issues, however, a few voices in this Administration have been heard to call for its abolition by the adoption of restrictions so extreme that nothing of value would be left in the program.

The advocates of change assert that minorities and women have fared worse under the affirmative action programs of government contrators than they have with employers which do not have affirmative action programs, ascert that "goals and timetables" have operated as ceilings imposing an artificial maximum on minority and female hires and promotions, contradictorily assert that "goals and timetables" are indistinguishable from quotas, assert that a program of voluntary compliance by employers would be sufficient, assert that the government should not even be allowed to look at an employer's actions to determine whether it is complying, and assert that employers which retain their own voluntary system of goals and timetables should be put in fear of potential lawsuits if they continue to do on their own

what the government up to now has required them to do.[5]

The hearing today is particularly important because many of the justifications advanced by the advocates of change will not stand up to the light of day, and this hearing should help shed that light.

Part B of this Statement discusses the false assumptions which have led some Administration officials to the erroneous conclusion that the Executive Order program is in need of drastic change. Part C discusses the history of the effort to ensure that government contractors do not discriminate in their employment practices. See pp. 19-24. Part D discusses the widespread acceptance of the program by business, labor, the courts, and Congress. See pp. 24-27. Part E discusses the specific changes proposed by some Administration officials. See pp. 27-34. Part F discusses the importance of reliance on statistical proof of discrimination. See pp. 34-37. Part I states our conclusions. See pp. 37-38.

B. The False Assumptions Underlying the Arguments for Drastic Changes in the Program

1. Myth No. 1: The Assumption that Minorities and Women Fare Worse with Employers Which Are Government Contractors

We know of no evidence to back up the assertion of Assistant Attorney General Reynolds that women and members of

---

[5] "Rights Chief Assails Hiring Goals as Failure", by Robert Pear, New York Times, November 1, 1985, p. A19. A copy is attached as Attachment A. The speech reported in this article was given by William Bradford Reynolds, Assistant Attorney General for the Civil Rights Division, on October 31, 1985. A copy of the speech is attached hereto as Attachment B.

minority groups have fared worse when they were employed by Federal contractors than when they worked for private companies not covered by affirmative-action requirements.[6] If Mr. Reynolds has meaningful evidence to back up his assertion, we hope that he will make it available to this Subcommittee and to the public.

Our information is exactly the reverse of Mr. Reynolds' assertion, and is based on the experience of the ineffectiveness of the government contractor program before the introduction of goal-and-timetable requirements,[7] on four independent studies as well as on our own experience in litigating employment discrimination cases.

Turning first to the independent studies, there are several recent empirical analyses of the impact of affirmative action under the Executive Order which have proven its effectiveness in increasing the employment of minorities and women while

---

[6] Speaking of the enforcement program under Executive Order 11246, Assistant Attorney General Reynolds stated:

> To label such preferential treatment affirmative action insults common intelligence. ...
>
> And how have minorities and women fared under this "affirmative action" program? Not nearly so well as they have done in the private sector without OFCCP interference. For, the bureaucracy's preoccupation with statistical balance has served many times to prevent deserving blacks and females from being selected or advanced out of a concern over disturbing the accepted equilibrium. ...

October 31, 1985 Rotary Club speech at pp. 9-10.

[7] See Part C below.

producing positive business results:

> The evidence shows that two decades of affirmative action have helped produce many gains for minorities and women in our nation's workforce. While neither a panacea nor a substitute for economic growth, education, job training and ambition, affirmative action has made significant contributions to improved occupational status for many minorities and women, a closing of the gap attributable to discrimination.[8]

According to a study by OFCCP in 1983,[9] based on a review of more than 77,000 companies with over 20 million employees, minorities and women made significantly greater gains in employment at those establishments contracting with the

---

[8] Affirmative Action to Open the Doors of Job Opportunity, A Report of the Citizens' Commission on Civil Rights, Washington, D.C. (June 1984) at p. 122. For a full discussion of the effectiveness of affirmative action, see pp. 122-146 of the Citizens' Commission report. Members of the Citizens' Commission include many prominent officials of both Republican and Democratic Administrations including Erwin N. Griswold, former Solicitor General of the United States; William H. Brown, III, former Chairman of the EEOC; Arthur Flemming, former Chairman of the U.S. Commission on Civil Rights, and Secretary of H.E.W; Elliot L. Richardson, former Attorney General and Secretary of H.E.W.; Harold Tyler, former Deputy Assistant Attorney General, U.S. District Court Judge, and Assistant Attorney General for Civil Rights; Frankie M. Freeman, Murray Saltzman and Manuel Ruiz, former members of the U.S. Commission on Civil Rights; Eleanor Holmes Norton, former Chair, EEOC; Wilbur Cohen, former Secretary of H.E.W.; Ray Marshall, former Secretary of Labor; Grace Olivarez, former Administrator, Community Services Administration; Theodore Hesburgh, former Chairman, U.S. Commission on Civil Rights, Aileen Hernandez, former member of the EEOC, as well as Judge William M. Marutani, Court of Common Pleas of Pennsylvania; and former U.S. Senator Birch Bayh.

[9] Office of Federal Contract Compliance Programs, Employment Standards Administration, U.S. Department of Labor, A Review of the Effect of Executive Order 11246 and the Federal Contract Compliance Program on Employment Opportunities of Minorities and Women (1983).

federal government than at non-contractor companies.[10] Furthermore, this OFCCP study showed that federal contractors had a smaller proportion of minority and female employees locked into lower-paying jobs than non-contractors.[11]

A similar study of federal contractors and non-contractors, submitted to the Department of Labor in 1983 by Professor Jonathan Leonard of the University of California at Berkeley, "The Impact of Affirmative Action," corroborated the Department of Labor's findings.[12] Leonard found that:

> Black male employment share increased relatively more in contractor establishments under the affirmative action obligation than in non-contractor establishments between 1974 and 1980. This holds true in a number of specifications, and it holds true controlling for establishment size, growth industry, region, occupational structure, corporate structure, and past employment share. This appears to reflect changed establishment behavior, rather than the selection into contrac-

---

[10] The study found that minority employment increased 20.1% and female employment increased 15.2% between 1974 and 1980 for federal contractors (with a total employment growth of only 3%), as compared to non-contractor company increases of 12.3% for minority employment and 2.2% for female employment (with an 8.2% total employment growth over the same period). Id. at p. 8.

[11] Among contractors, the proportion of minority employees who were performing skilled and white collar jobs increased from 37.9% in 1974 to 47.4% in 1980, while increasing only from 35.9% to 39.1% during the same period in non-contractor companies. Id. at p. 19.

[12] Jonathan S. Leonard, The Impact of Affirmative Action (1983). See also Testimony of Jonathan Leonard before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, July 10, 1985. These results were based on a comparison of Federal contractors subject to the Executive Order with non-contractors in a sample of nearly 70,000 establishments with more than 16 million employees, between 1974 and 1980.

> tor status of an establishment with high or growing black male employment share. This positive employment impact has been relatively greater in the more highly skilled occupations, and has resulted in net upgrading for black males.[13]

Leonard also found that black employment has increased faster at establishments that have undergone a contract compliance review than at establishments which have not undergone such a review.[14] A 1984 study by the Potomac Institute also found that affirmative action was a significant factor in increasing both the number of minorities and women in the workplace and the quality of their jobs.[15] The above findings, among others, belie the notion that making affirmative action purely voluntary would lead to the same results as under the existing contract compliance program.

The impact of the Executive Order program can perhaps be seen most graphically by relating two examples where industries started to implement affirmative action in the late 1960's and have continued to operate under such programs -- IBM and the Philadelphia construction industry.

Since establishing an equal opportunity department in 1968 to comply with the Executive Order, IBM's work force has changed dramatically. In 1962 IBM had 750 black employees, which increased to 7,251 in 1968 and to 16,546 in 1980. The composi-

---

[13] Id. at p. 38.

[14] Id.

[15] Herbert Hammerman, A Decade of New Opportunity: Affirmative Action in the 1970's, Potomac Institute, Washington, D.C. (1984).

BEST COPY AVAILABLE

tion of IBM's officials and managers increased from 429 blacks, 83 Hispanics and 471 females in 1971 to 1,596 blacks, 436 Hispanics and 2,350 females by 1980. From a small representation of females and minorities in 1962 (12.7% and 1.5% respectively), by 1980, IBM had significantly integrated its workforce (22.2% female and 13.7% minority). It would be difficult to assert that IBM has suffered financially or otherwise because of such affirmative action.[16]

Before the Philadelphia plan was adopted in the late 1960's, OFCCP found that fewer than 1% of the Philadelphia area construction workers were minorities. Although far short of the Government's goal of 19 to 20 percent, by 1982 the percentage of Philadelphia construction workers who were minority had risen dramatically to more than 12%.[17]

Affirmative action has not only increased minority and female participation in the workforces of many companies, but "has led to a better working environment, improved communications and benefitted corporate relations with the community."[18] Many

---

[16] See Citizens' Commission Report, supra note 6 at 126-127; Affirmative Action Coordinating Center, A Statement in Support of Affirmative Action: The IBM Story (1981) (unpublished paper).

[17] Citizens' Commission Report, supra note 6 at 127; Affirmative Action: Birth and Life of a "Bugaboo," Washington Post, April 11, 1982 at A1, A10.

[18] Prepared testimony of William S. McEwen, Director of Equal Opportunity Affairs for Monsanto Company, testifying on behalf of the National Association of Manufacturers before the Subcommittee on Employment Opportunities of the House Committee on Education and Labor, and the Subcommittee on Civil and Constitutional Rights of the House Committee on the Judiciary, July 10, 1985, pp. 10-11, Excerpts were reported in the Washing-

top management officials view affirmative action as "good business", part of "good corporate citizenship", resulting in an expansion of business in the communities in which they operate.[19] In addition, many companies with affirmative action programs report that affirmative action has numerous other beneficial side effects, such as establishing or improving procedures regarding hiring, promotion, disciplinary actions and employee performance reviews,[20] and the production of "new ideas, opinions and perspectives in management, product development and marketing."[21]

Our first example of the effectiveness of the Executive Order program based on our litigation experience is more subjective. (For our second example, see our response to Myth No. 2). We sue many types of employers, large and small, public and private. In general, we have found that discrimination tends to be broader in scope, more harmful in its effects, and more blatant when the employer is not a government contractor. For example, some of our cases against Federal agencies involve practices much worse than one would find in a case against a major national company which is a government contractor. The difference, we believe, comes from the fact that Federal officials, and private employers which are not government

---

ton Post, Friday August 16, 1985, A-23 (hereinafter referred to as "NAM testimony").

[19] Citizens' Commission Report at pp. 130-41.

[20] Id. at pp. 142-146.

[21] NAM testimony, supra note 18 at p. 2.

contractors, are not generally required to explain the underutilization of women and minorities, and are not generally required to adopt goals and timetables to eliminate deficiencies.[22] In plain terms, they do not have someone looking over their shoulders and asking for explanations whenever poor results are achieved. As a result, they pay less attention to the law.

2. Myth No 2: The Assumption that Affirmative Action Benefits Only the Most Skilled and Most Employable Minorities and Women Who Do Not Really Need Help in Getting Hired, and that the Program Does Not Help Those Who Need it Most

As you know, one of the justifications being given by some advocates for weakening the Executive Order program is that it benefits only the well-educated minorities and women who do not need its help, and thus that the program is ineffective as a whole. In our experience in litigating cases, we have found that many poor and disadvantaged persons have been helped, and that in the hands of willing and capable administrators, the program has had and can have great effectiveness.

For example, the Lawyers' Committee has brought a number of fair employment lawsuits against textile companies in the South. As part of our cases, we routinely go into personnel records to show historical patterns in hiring and job assign-

---

[22] One glaring example should suffice to make this point. The U.S. Office of Personnel Management develops tests for hiring in a large number of government jobs. Notwithstanding the clear requirements of the law, it usually does not keep statistics showing whether its tests exclude minorities and women at disproportionately high rates. It is difficult to imagine a large government contractor so insensitive to vulnerability to a Title VII lawsuit.

ments. In virtually all of our cases, we have found that few or no black women were hired in textile mills until the late 1960's. This was part of an industrywide pattern, under which white men and white women were hired for desirable jobs, black men were hired for low-paying, undesirable jobs, and black women were simply not hired at all. By 1968 and 1969, few lawsuits had been brought against textile firms, and the old patterns continued. In late 1968 and early 1969, however, the government began paying close attention to the poor employment statistics of many contractors. Sparked by a private lawsuit in the District of Columbia challenging a "gentleman's agreement" between a Defense Department official and a major textile company,[23] the government began to focus its attention on the textile industry. It became clear that textile mills' compliance would be determined by their success in hiring black women and that mere protestations of good-faith efforts would no longer be sufficient.

As soon as this lesson sank in, textile companies across the South began hiring black women in growing numbers. Many white textile workers had only elementary-school educations; it is in the nature of textile mills that dexterity is far more important to production than formal education. Accordingly, many of the black women hired in the late 1960's as a result of this

[23] The case did not result in any direct relief against the government, and was ultimately dismissed. It did, however, have the desired effect of increasing compliance efforts as to the textile industry.

affirmative action also had only elementary-school educations. For many, it was their first factory job and their first job paying the minimum wage.[24] Without the emphasis on numerical measures of compliance, these changes would never have occurred and these women---among the most disadvantaged of all workers---would never have been able to find decent jobs.

3. Myth No. 3: The Assumption that the Executive Order Program Requires Quotas Instead of Goals, Or That There is No Difference Between Quotas and Goals

Under the present Executive Order, government contractors are required to analyze their work force and to adopt goals and timetables where the facts show a need for such action. Since the Philadelphia Plan was adopted by the Nixon Administration in 1969, the use of goals and timetables has been an especially effective method of assuring equal employment opportunities for women and minorities. By encouraging contractors to hire qualified women and minorities in accordance with their availability in the labor force, the Executive Order program has greatly reduced underemployment and underutilization of qualified minority and women workers. Regulations implementing the present Executive Order specifically preclude "inflexible quotas," providing only for "good faith" efforts to reach

---

[24] Many of the black women who were hired had previously worked in the fields and been displaced by the mechanization of agriculture, or had worked in private homes as domestic servants. Neither type of work was then subject to the minimum wage.

"reasonably attainable" goals.[25]

The assertions by some Justice Department officials that there is no meaningful difference between "goals" and "quotas" overlook the fact that the Supreme Court has itself distinguished between rigid, inflexible ratios and flexible targets or goals, and has struck down the former while approving the latter. In Regents of the University of California v. Bakke, 438 U.S. 265, 57 L.Ed.2d 750 (1978), the Court struck down the rigid quota for minority enrollment at the medical school on the university's Davuis campus, while upholding the university's right to take race into consideration in a more flexible way. Justice Powell's opinion praised Harvard University's more

---

[25] The Department of Labor regulations governing the Office of Federal Contract Compliance Programs (OFCCP) provide:

> (e) Goals may not be rigid and inflexible quotas which must be met, but must be targets reasonably attainable by means of applying every good faith effort to make all aspects of the entire affirmative action program work.
>
> 41 C.F.R. §60-2.12 (1984)

As Labor Secretary Brock has stated: "[t]here is a distinction which you can make between absolute numbers and quotas and so-called goals approaches." (Address before the NAACP convention, Dallas, Texas, June 24, 1985), Washington Post, Friday, August 16, 1985 at A23.

The essence of the distinction is that goals are flexible objectives subject to the availability of qualified women and minorities; quotas are strict requirements which do not depend on workforce availability. See Citizens Commission Report at pp. 66-69. Failure to meet a goal does not subject a contractor to sanctions under the Executive Order; contractors need only demonstrate "good faith efforts to make its program work toward the realization of the program's goals within the timetables set for completion." 41 C.F.R. §60-2.15 (1984)

flexible consideration of race---along with other subjective factors such as geography, rural origin, etc., promoting diversity in the student body---in deciding which students to admit to its College. 438 U.S. at 315-24, 57 L.Ed.2d at 786-92. Explaining the distinction, Justice Powell wrote:

> This kind of program treats each applicant as an individual in the admissions process. The applicant who loses out on the last available seat to another candidate receiving a "plus" on the basis of ethnic background will not have been foreclosed from all consideration for that seat simply because he was not the right color or had the wrong surname. It would only mean that his combined qualifications, which may have included similar nonobjective factors, did not outweigh those of the other applicant. His qualifications would have been weighed fairly and competitively, and he would have had no basis to complain of unequal treatment under the Fourteenth Amendment.

438 U.S. at 318, 57 L.Ed.2d at 788-89 (footnote omitted).

The Supreme Court addressed the question again in United Steelworkers of America v. Weber, 443 U.S. 193, 61 L.Ed.2d 480 (1979). There, Kaiser Aluminum and the Steelworkers had collectively bargained to establish a new craft training program, under which 50% of the trainees would be black until such time as the percentage of craft workers in the plant who were black approximated the percentage of the part of the local labor force which was black. Weber argued, as the Justice Department does today, that all forms of racial preference are wrong and should be barred. Rejecting this argument, the Court approved the plan because it was designed to break down old patterns of racial segregation and hierarchy, did not unnecessarily trammel the interests of white workers, did not require the discharge of

white workers and their replacement by blacks, did not create an absolute bar to the advancement of whites, and was temporary.

The hallmark of a permissible goal is its flexibility. The failure to meet a goal, whether the goal is included in a voluntary affirmative action plan or a court order, does not mean that there has been a violation of the law or of the court order; it simply triggers further inquiry. It has often happened in our cases that a defendant has failed to meet a goal, but on inquiry has satisfactory reasons explaining the failure: the absence of qualified minority candidates after a good-faith effort to recruit minority applicants, special qualifications required for the particular slot in question, particular problems with the minority candidates available for selection (such as other things in their past experience or background which would provide nondiscriminatory reasons for failure to hire them), equitable considerations requiring the hiring of particular white candidates for reasons having nothing to do with discrimination (returns from military leave, completion of company-approved training programs or courses of study, or particularly good qualifications). Sometimes the reasons for failure to meet the goal are satisfactory (in the Lawyers' Committee's experience, this is often the case), and sometimes not. In <u>each</u> instance, however, the failure to meet the goal is merely a trigger for further inquiry; in <u>no</u> case is such a failure in and of itself tantamount to a violation of the law or of a court order.

4. Myth No. 4: The Assumption that There is No Further Need for Affirmative Action Programs

Although significant progress has been made because of the Executive Order, "much more must be done to ensure that opportunity exists at all levels."[26] The majority of women and minorities remain concentrated in low paying, low-status occupations or are disproportionately unemployed. The median income of black families today is about $ 8,000 less than that of white families, and 13.7% of black men are unemployed as compared to 6.6 percent of white men.[27] Similarly, although women's salaries have increased, a woman working full-time still earns on an average only approximately 63 percent of male income.[28] The dismantling of a pervasive system of discrimination against minorities and women, begun only in the past generation, and the creation of a more equal and just society are goals of paramount importance -- but they are goals that are not easily achieved. In many areas, affirmative action under the Executive Order is just starting to make a dent in eradicating entrenched discrimination.

In addition to the general need for continuation of the present program, there are particular areas of the economy in which a return to discrimination is all but inevitable if the

---

[26] NAM testimony, supra note 18, at p. 3.

[27] Washington Post, March 31, 1985, K1.

[28] U.S. Census Bureau, Current Population Reports, P-60, No. 140, Money Income and Poverty Status of Families and Persons in the United States: 1982 at 18 (1983).

present requirements are relaxed. For example, the construction industry and craft unions have made progress primarily through the compulsion of litigation and the Executive Order program. The Sheet Metal Workers union in New York is still embroiled in litigation over ongoing discrimination and refusal to implement past court orders; the Operating Engineers in Philadelphia have just lost their most recent case. It is, perhaps, significant that the one segment of American business to applaud the proposed weakening of the Executive Order program has been the construction industry.

The Lawyers' Committee, as well as the rest of the country, looks forward eagerly to the day when true equality of employment opportunity exists, and it will no longer be necessary to have any race- or gender-conscious preferences. That day has not yet arrived, and its arrival will be delayed, not advanced, by a turning of the government's back away from the only kinds of programs which have proven effective.

C. The History of the Executive Order Program

1. The Early Days -- 1941-1968

In considering whether or not it is advisable to dismantle the present Executive Order program, it is important to recall the painful history of Governmental efforts, undertaken by every President since Franklin D. Roosevelt to end job discrimination.[29] In 1941, President Roosevelt issued the first execu-

---

[29] See e.g., Barry L. Goldstein, "The Historical Case for Goals and Timetables," New Perspectives, U.S. Commission on Civil Rights (Summer 1984), pp. 20-26; Citizens Commission Report,

tive order banning discrimination by defense contractors. (E.O. 8802).[30] Executive Order 8802 established the Fair Employment Practice Committee (FEPC) to investigate complaints of discrimination and to recommend necessary measures to eliminate discrimination against minorities. President Roosevelt later expanded coverage of the executive order to all Federal government contractors and subcontractors.[31] According to the Final Report of the FEPC in 1946, however, "wartime gains of Negro, Mexican-American and Jewish workers were being lost through an unchecked revival of discriminatory practices."[32] The last chairman of the FEPC, which was dissolved in 1946, observed that the FEPC was "concerned and diligent; [but it] simply had not been given the tools to do the job."[33]

Presidents Truman and Eisenhower each issued two

---

supra, note 6 at pp. 29-65.

[30] Executive Order 8802, 6 Fed.Reg. 3109, 3 C.F.R. 1938-43 Comp. 957, signed by President Roosevelt on June 25, 1941, for the first time required defense contractors, "not to discriminate on the basis of race, creed, color or national origin."

[31] E.O. 9001, 6 Fed.Reg. 6787, 3 C.F.R. 1938-43 Comp. 1054 (Dec. 27, 1941); E.O. 9346, 8 Fed.Reg. 7183, 3 C.F.R. 1938-43 Comp. 1280 (May 27, 1943).

[32] Final Report of FEPC (Washington, D.C., G.P.O: 1947, pp. 1-2). The percentage of workers in production industries who were black increased from 3% of all war production workers in March 1942 to 8% at the end of the war. L. Ruchames, Race, Jobs and Politics - The Story of FEPC (New York: Columbia University Press, 1953), p. 159; Citizens' Commission Report supra, note 6 at pp. 33-34.

[33] Malcolm Ross, "Some Wartime Lessons on Ending Job Discrimination", The Washington Post, July 28, 1963, p. E-3, quoted in R. Nathan, Jobs and Civil Rights (Washington, D.C.: GPO, 1969, p. 150, n. 5).

executive orders extending the scope of coverage of non-discrimination requirements.[34] By the late 1950's, however, the Government concluded that remedies more effective than mere neutral non-discrimination provisions were necessary to ensure equal employment opportunity. President Eisenhower's Contract Compliance Committee, chaired by Vice President Richard Nixon, made clear that the major barrier to the hiring and promotion of minorities was "the indifference of employers to establishing a positive policy of non-discrimination." (emphasis in original).[35] President Kennedy adopted the Nixon Committee recommendation that "positive" action was needed and signed Executive Order 10925 in 1961. This Order established "the policy of the executive branch of the Government to encourage by positive measures equal opportunity for all qualified persons" and required "affirmative action" by all Federal contractors.[36] Since 1961, every Administration, including the present one, has

---

[34] E.O. 9664 (1945) (Truman); E.O. 10210 (1951)(Truman); E.O. 10479 (1953)(Eisenhower); E.O. 10557 (1954)(Eisenhower).

[35] Committee on Government Contracts, Pattern for Progress. Final Report to President Eisenhower (Washington, D.C. 1959/1960), p. 14; see also United States Commission on Civil Rights, 1961 Report: Employment, Book 3, p. 75 (1961); Citizens' Commission Report supra note 6 at pp. 34-36.

[36] Executive Order No. 10925, 26 Fed.Reg. 1977, 3 C.F.R., 1959-63 Comp. 448, signed by President Kennedy on March 6, 1961. Race, creed and national origin discrimination have been barred by Executive Orders dating back to 1941. In 1967, sex discrimination was added to the list of prohibited discriminations and the word "creed" was changed to "religion." E.O. 11374 (1967).

obligated Federal contractors to take "affirmative action."[37]

At first, "affirmative action" under the Executive Order was not defined precisely. In 1967, the Director of the Office of Federal Contract Compliance (OFCC), offered the following pragmatic definition of affirmative action:

> "There is no fixed and firm definition of affirmative action. I would say that in a general way, affirmative action is anything that you have to do to get results. ... Affirmative action is really designed to get employers to apply the same kind of imagination and ingenuity that they apply to any other phase of their operation."[38]

The present Executive Order, Executive Order 11246, was signed by President Johnson in 1965. The general direction of the OFCC in the early days of E.O. 11246 was to require "results", leaving the development of the means to the "ingenuity" of the contractor.[39] But OFCC soon found that in many industries, particularly in those where exclusionary and discriminatory practices were long entrenched, general exhortations to engage in affirmative action did not produce results.

OFCC established a series of special area programs in 1965 to "assure minority group representation in all trades and

---

[37] In passing Title VII of the Civil Rights Act of 1964, Congress specifically considered the Executive Order program and contemplated its continuance. Citizens Commission Report supra note 6 at 39-40; 110 Cong. Rec. 7215 (1964), 42 U.S.C. § 2000e-17.

[38] Edward C. Sylvester, Director of OFCCP, Report of 1967 Plans for Progress Fifth National Conference, pp. 73-74, quoted in Nathan, Jobs and Civil Rights, p. 93.

[39] Citizens' Commission Report, supra note 6 at 40-41.

in all phases of the work."[40] The process required the low bidder, prior to the award of the contract, to submit an affirmative action plan to meet that standard.[41] In order to meet this general requirement, a contractor under the Cleveland area program presented a specific proposal detailing the total number of employees he would use in each trade and indicating how many of that number would constitute his "goal" of minority employment. Soon the decision was made to require similar "manning" tables for all Federal construction in the Cleveland area.[42]

2. The Philadelphia Plan: 1969

After considerable debate in the late 1960's, the Labor Department under President Nixon issued the revised Philadelphia Plan in June 1969. The major provision in the revised Philadelphia Plan required that those bidding on Federal or Federally-assisted construction contracts submit goals for minority employee utilization which were within a range established by the government, and commit themselves to make "good faith" efforts to achieve such goals:[43]

> "All that a contractor has to do to be eligible for a contract is to make a commitment to seek in good faith to meet his self-imposed goal. There is neither per se compliance nor per se violation

---

[40] Jones, The Bugaboo of Employment Quotas, 1970 Wisc. L.Rev. 341, 343-44.

[41] Id., at p. 346, Goldstein, supra note 14 at p. 20.

[42] Ibid., at p. 346, Goldstein, supra note 29 at p. 20; Citizens' Commission Report supra note 6 at pp. 43-44.

[43] Goldstein, supra note 14 at p. 22; Citizens' Commission Report, supra note 6 at pp. 45-48.

> associated with the goals or the ranges. Minority utilization above or below the goals, or above or below the ranges, at most is presumptive evidence of compliance on the positive side, and on the negative side, evidence of probable cause to believe that a review of a contractor's overall compliance posture is warranted.[44]

(Emphasis in original).

The Philadelphia Plan was found lawful in Contractors' Ass'n of Eastern Pennsylvania v. The Secretary of Labor, George P. Shultz, 442 F.2d 159 (3d Cir.), cert. denied, 404 U.S. 854 (1971).[45] Attorney General John N. Mitchell issued an opinion in September 1969 concluding that the Executive Order was lawful and that the Philadelphia Plan was a lawful implementation of the Order.[46] The Assistant Secretary of Labor, Arthur Fletcher, stressed that "voluntarism" was not enough; the way to achieve "concrete results" is to set "specific goals."[47] A 1969 Congressional attempt to attach a rider to an appropriations bill

---

[44] Jones, supra note 40, at p. 379. Professor Jones was an Associate Solicitor of Labor and head of the division which provided legal services to the OFCC during the period of the development of the Philadelphia plan.

[45] The Seventh Circuit Court of Appeals upheld a similar plan stating that "[i]n this case we believe that numerical objectives may be the only feasible mechanism for defining with any clarity the obligation of federal contractors to move employment practices in the direction of true neutrality." Southern Illinois Builders Association v. Ogilvie, 471 F.2d 680, 686 (7th Cir. 1972). See also e.g. Assoc. Gen. Contractors v. Altshuler, 490 F.2d 9 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974).

[46] 42 Op. Att'y. Gen. 405, 408 (1969).

[47] BNA, Daily Labor Report, August 25, 1969, p. E-2; See Goldstein, supra, at 22-23, Comment, The Philadelphia Plan: A Study in the Dynamics of Executive Power, 39 Chi. L. Rev. 723 (1972).

outlawing affirmative action goals and timetables and the Philadelphia plan failed after extensive debate.[48]

3. Order No. 4 - Extension of Goals and Timetables: 1971

In 1971, Revised Order No. 4 was issued by OFCCP, extending the concept of goals and timetables to all nonconstruction contractors. This Order, which is still in effect, requires Federal contractors to undertake an availability analysis in order to determine if there were fewer women or minorities in their employ than would be expected according to their availability for work. If this analysis revealed an underutilization of minorities and women, the contractor is required to develop measurable goals and timetables and make a "good faith" attempt to meet these targets.[49]

D. The Executive Order Program Has Gained Broad Public, Judicial, and Congressional Support

Support for affirmative action is not limited to civil rights organizations. There is also strong support for affirmative action from both the business and labor communities. The National Association of Manufacturers (NAM), an organization of 13,500 corporations throughout the country which employs 85

---

[48] 115 Cong. Rec. 40,013; 40,039; 40,906; 40,922; 40,749 (1969). Before the House rejected the rider, President Nixon stated "[t]he House of Representatives now faces an historic and critical civil rights vote." 115 Cong. Rec. 40,906 (1969). The President appealed to the House-Senate conferees "to permit the continued implementation of the Philadelphia Plan ..." BNA, Daily Labor Report, Dec. 19, 1969; Citizens Commission Report, supra note 6 at 48-49.

[49] Goldstein, supra note 29 at p. 23.

percent of all workers in manufacturing, believes that

> affirmative action has been, and is, an effective way of ensuring equal opportunity for all people in the workplace. Minorities and women, once systematically excluded from many professions and companies, are now systematically included.

NAM recognizes that "setting goals and timetables for minority and female participation is a way of measuring progress and focusing on potential discrimination."[50]

The Executive Council of the AFL-CIO recently issued the following statement in support of affirmative action, condemning the proposed changes to the Executive Order:

> For almost 20 years, the federal government has required employers with whom it does business to make positive affirmative action effort to hire blacks, Hispanics, and members of other minority groups in representative numbers. This requirement has been a vital weapon in the battle against discrimination in employment.
>
> There are now efforts underway in Washington to disarm this key weapon -- to repeal the Executive Order issued by President Lyndon Johnson. Instead, President Reagan is being urged by some in his Administration to substitute a new Executive Order lacking any teeth.
>
> Such a move would represent a giant step backward in the fight against employment discrimination. The existing Executive Order has worked well in opening job opportunities to members of minority groups who have been discriminated against for too many years.
>
> The AFL-CIO opposes repeal of Executive Order 11246. We have long supported--and continue to support--strong affirmative action. We urge the Administration to cease its constant search for ways to weaken the nation's civil rights laws, and instead to commit itself to enforcing those laws

---

[50] NAM testimony, supra note 18, at pp. 1-4.

vigorously and effectively.[51]

In 1972, while Congress was considering amendments to Title VII of the Civil Rights Act of 1964, there were several attempts to pass legislation ending the use of goals under the Executive Order. None of these attempts succeeded. In voting down these changes, the Congress "at long last unequivocally approved the affirmative action program of the executive."[52] After reviewing the Executive Order program in detail, Congress recognized that it was "vital", that it needed a greater enforcement effort, that affirmative action was central to the program, and that the program should be continued.[53] The Ninth Circuit Court of Appeals noted that "there can be no doubt that the essential feature of the affirmative action program reflected in the regulations promulgated in Revised Order No. 4 were effectively ratified by Congress in adopting the Equal Employment Opportunity Act of 1972."[54]

Since 1965, Executive Order 11246 has been widely accepted as an integral part of the government contracting

---

[51] Statement by the AFL-CIO Executive Council on Affirmative Action, August 15, 1985, Pittsburgh, Pa. (emphasis added)

[52] Comment, The Philadelphia Plan, supra, 39 Chi.L.Rev. at 757; 118 Cong. Rec. 2276 (1972).

[53] Goldstein, supra note 29, at p. 26; 118 Cong. Rec. 1662-1676; 2275-76 (1972); 118 Cong. Rec. 1398 (1972); Senate Committee on Labor and Public Welfare, Legislative History of the Equal Employment Opportunity Act of 1972, pp. 915, 927, 1406-07, 1519-20.

[54] Legal Aid Society of Alameda County v. Brennan, 608 F.2d 1319, 1329-30 n. 14 (1979), cert. denied, 447 U.S. 921 (1980).

60 638 0 - 86 - 3

process. Despite arguments by the Justice Department in the past year that the Supreme Court, in the Memphis Firefighters case,[55] outlawed affirmative action not limited to proven individually identifiable victims of discrimination, the seven Circuit Courts of Appeal to consider the validity of affirmative action plans and court orders after the Memphis case have unanimously rejected the Justice Department's interpretation.[56]

E. The Weakening Changes Proposed by Some Administration Officials

The Attorney General and the Office of Management and Budget have drafted a proposed executive order which would amend Executive Order 11246 and strip from the program everything of value. A copy of the draft Order, published by the press in August 1985, is attached as Attachment C.

The draft Executive Order would make four major changes in the existing Government contract compliance program:

---

[55] Firefighters Local Union No. 1784 v. Stotts, 104 S.Ct. 2576 (1984).

[56] See Kromnick v. School Dist. of Philadelphia, 739 F.2d 894, 911 (3d Cir. 1984), cert. denied, 105 S.Ct. 782 (1985); Turner v. Orr, 759 F.2d 817, 823-824 (11th Cir. 1985); Diaz v. American Telephone & Telegraph Co., 752 F.2d 1356, 1360 n.5 (9th Cir. 1985); Vanguards of Cleveland v. City of Cleveland, 753 F.2d 479 (6th Cir. 1985), cert. granted, 54 U.S. Law Week 3223 (No. 84-1999); EEOC v. Local 638 Sheet Metal Workers' Int'l Assn., 753 F.2d 1172, 1185-86 (2d Cir. 1985), cert. granted, 54 U.S. Law Week 3223 (No. 84-1656); Grann v. City of Madison, 738 F.2d 786, 795 n.5 (7th Cir.), cert. denied, 105 S.Ct. 296 (1984), Devereaux v. Geary, No. 84-2004, 38 Fair Empl. Prac. Cas. 23 (BNA) (1st Cir. June 24, 1985), Commonwealth of Pennsylvania v. Local Union 542, International Union of Operating Engineers, No. 84-1614 (3d Cir. July 17, 1985), Paradise v. Prescott, 767 F.2d 1514 (11th Cir. 1985).

1. Elimination of Goals and Timetables

The proposed new executive order would prohibit the government from seeking to have contractors adopt affirmative action plans that include numerical goals and timetables. The draft Order would stop the Department of Labor from obligating contractors to engage in any form of race or sex-conscious affirmative action, even the watered-down form of affirmative action that the Civil Rights Division of the Department of Justice has advocated during the Reagan Administration -- affirmative recruitment.[57]

2. Barring the Use of Statistical Evidence

Under the present Executive Order, the Office of Federal Contract Compliance Programs can consider the same kind of evidence that a court would examine to determine if a contractor is in violation of the law. The Supreme Court has uniformly

---

[57] The Justice Department has embarked on a campaign to eliminate hiring goals and timetables in 51 cases involving state and local government agencies across the country. It has tried to persuade courts to replace hiring goals with provisions requiring that the employer recruit so that a given percentage of applicants would be black, or Hispanic, or female. The draft Executive Order would rule out even this form of affirmative action:

> "Sec. 217 Nothing in this Executive Order shall be interpreted to require or to provide a legal basis for a Government contractor or subcontractor to utilize any numerical quota, goal, or ratio, or otherwise to discriminate against or grant any preference to, any individual or group on the basis of race, color, religion, sex, or national origin with respect to any aspect of employment, including but not limited to recruitment, hiring, promotion, upgrading, demotion, transfer, layoff, termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship." (Emphasis supplied).

held over the last 50 years that statistics are an important form of evidence to be considered in discrimination cases, and the courts routinely rely on statistical evidence in deciding cases of employment discrimination.[58] Evaluation of statistical evidence is an important part of the Executive Order program.

The proposed Executive Order would bar consideration of statistical evidence no matter how compelling and no matter how great the weight the courts would give to such proof. The Labor Department would thus be required to ignore facts that courts and ordinary citizens understand are very relevant in determining the existence of discrimination.

3. Limiting the Types of Discrimination Covered

The present Executive Order covers the same types of discrimination which are covered by Title VII of the 1964 Civil Rights Act:

--"disparate impact" discrimination, which concerns practices that disproportionately exclude minorities or women from consideration and are not job-related;[59]

--"disparate treatment" discrimination based on

---

[58] See, e.g., Int'l Brotherhood of Teamsters v. United States, 431 U.S. 324, 339 (1977); Hazelwood School District v. United States, 433 U.S. 299, 302, 308 n.13 (1977), and New York City Transit Authority v. Beazer, 440 U.S. 568, 584-585 (1979). Teamsters relied on a line of jury discrimination cases going back to Norris v. Alabama, 294 U.S. 587 (1935).

[59] See e.g., Griggs v. Duke Power Company, 401 U.S. 424 (1971) and Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

subjective factors and proven by statistics (such as, that 90% of white applicants are hired, but only one out of a hundred black applicants are hired, where the employer has no objective qualification standards which would explain such a result);[60] and

-- the rare case of open, intentional discrimination ("whites only" or "women not wanted" signs are classic examples).

The proposed Executive Order appears to restrict coverage under the Executive Order to "demonstrated nondiscriminatory treatment." This language, along with the command not to consider statistical evidence, would effectively limit the reach of the Executive Order to only those unusual cases where there is direct evidence of discrimination. Blatant acts of discrimination rarely occur, and companies are not likely to acknowledge openly that their conduct is discriminatory. Thus, the Executive Order would no longer cover most forms of discrimination and would prohibit neither "disparate impact" nor "disparate treatment" discrimination by Government contractors.

4. Disincentives to Voluntary Action

The present Executive Order encourages voluntary action even where there is no governmental proceeding against the contractor. The most notable example of such voluntary action was an agreement between Kaiser Aluminum Co. and United Steel-

---

[60] See e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981).

workers of America to create a job training program to increase the number of black skilled workers at the company. The Supreme Court approved this kind of voluntary action in the Weber case.[61]

The proposed Executive Order provides a disincentive for such voluntary action by asserting that it does not "provide a legal basis" for the contractors to use goals and timetables, even for training. Thus, a company could not rely on its legal obligations under the Executive Order as a justification for the adoption of a voluntary plan as was done in Weber. This can only result in an increased number of contested cases and a delay in progress toward true equal opportunity. Voluntary compliance would be discouraged instead of encouraged.

In short, the draft Order, if signed, would constitute one of the most disturbing and significant civil rights retrenchments of the past half-century. It sharply conflicts with numerous rulings of the courts, the provisions of the fair employment laws, and even the Justice Department's own position on limitations on remedies for past discrimination. The draft would leave nothing but the facade of the present enforcement program, would effectively limit the Executive Order to rare cases in which direct proof of intentional discrimination is available, and would discourage voluntary affirmative action.

---

[61] United Steelworkers of America v. Weber, 443 U.S. 193 (1979).

5. The Reported "Compromise" or "Option" Language

There have been recent press reports that some officials within the Administration had attempted to reach a "compromise"---and now intend to present the President with an "option"---which would leave the program just as dead, but look a little better. Under this "compromise", a provision would be inserted in the draft executive order or in the regulations stating that, while the government would no longer require goals and timetables, the executive order would not forbid employers from continuing their own voluntary programs of goals and timetables. It would thus make explicit what was already implicit in the earlier draft.

We submit that this is a distinction without a difference. The "compromise" would still bar contractors from relying on the executive order program as a defense to a reverse discrimination lawsuit, and the Justice Department has stated its eagerness to sue any employer who dares to rely on the "compromise" language. On September 11, 1985, the Washington Post reported on p. A1:

> In addition, Justice Department officials note that employers could not use the executive order as justification for imposing goals and timetables if they are challenged in court, for example, by white employees concerned that the plan may be unfair to them.
>
> "Under Title VII, no discrimination is permitted in hiring or promotion of employees," said a Justice Department official. "If that is the case, it would be up to the courts to lay that down as the law . . . . The Justice Department might even side with the complainants who brought

such a case." (Emphasis supplied).

Thus, the superficially more moderate language being urged by the Justice Department and the Office of Management and Budget would simply open the door to harassment of employers by "reverse discrimination" plaintiffs and the Justice Department.

6. The Consequences of Making the Proposed Changes

As the Equal Employment Opportunity Commission (EEOC) and the Justice Department, combined, file only a couple of hundred fair employment lawsuits a year (out of almost 10,000 new cases filed under the fair employment laws by private citizens each year), the Labor Department's monitoring of thousands of government contractors each year under the present Executive Order has been the federal government's main weapon in combatting job discrimination.

Any change in the Executive Order would have great symbolic importance, and -- even if not intended to have any effect on the actual operations of OFCCP -- would be perceived to be a weakening of the program, and would lead many contractors to reduce their efforts. It is not always easy for a large company to monitor the personnel practices of the plant managers and personnel officials at each of its farflung facilities. In the last few years, some corporate managers have indicated that perceptions of a slackening of governmental interest in enforcing civil rights were making it more difficult for them to keep their local managers from returning to their old ways of recruitment,

hiring and promotion.[62]

Revoking the Executive Order would permit and encourage local plant managers in numerous companies to go back to their old ways -- hiring mostly white males -- thus exposing companies to increasing legal liability for employment discrimination under Title VII of the Civil Rights Act of 1964.[63] This can hardly be desirable from either a management or an employee perspective. Instead of its traditional role of encouraging employers to take

---

[62] Citizens' Commission Report, supra note 6 at 139.

[63] The proposed Executive Order would not change the standards of liability for employment discrimination under Title VII. The Courts of Appeals have unanimously recognized that, in some cases, the need to eradicate the effects of widespread discrimination calls for prospective, race-or-gender-conscious affirmative relief. See, e.g., Boston Chapter, NAACP, Inc. v. Beecher, 504 F.2d 1017, 1027-1028 (1st Cir., 1974), cert. denied, 421 U.S. 910 (1975); Equal Employment Opportunity Commission v. Local 638 ... Local 28 of the Sheet Metal Workers' Int'l Ass'n, 753 F.2d 1172, 1185 (2d Cir., 1985); Ass'n Against Discrimination in Employment, Inc. v. City of Bridgeport, 647 F.2d 256, 279-81 (2d Cir.), cert. denied, 455 U.S. 988 (1981); Rios v. Enterprises Ass'n. Steamfitters Local 638, 501 F.2d 622, 629 (2d Cir., 1974); Kromnick v. School District of Philadelphia, 739 F.2d 894, 909-10 (3rd Cir., 1984), cert. denied, 105 S.Ct. - 782 (1985); EEOC v. American Tel. & Tel. Co., 556 F.2d 167, 174-177 (3rd Cir. 1977), cert. denied, 438 U.S. 915 (1978); Chisholm v. United States Postal Service, 665 F.2d 482, 499 (4th Cir., 1981); United States v. City of Alexandria, 614 F.2d 1358, 1363-1366 (5th Cir., 1980); United States v. I.B.E.W., Local No. 38, 428 F.2d 144, 151 (6th Cir.), cert. denied, 400 U.S. 943 (1970); United States v. City of Chicago, 663 F.2d 1354, 1362 (7th Cir. 1981)(en banc); Firefighters Institute v. City of St. Louis, Missouri, 616 F.2d 350, 364 (8th Cir., 1980), cert. denied, 452 U.S. 938 (1981); United States v. Ironworkers Local 86, 443 F.2d 544, 553-554 (9th Cir.), cert. denied, 404 U.S. 984 (1971); United States v. Lee Way Motor Freight, Inc., 625 F.2d 918, 943-44 (10th Cir., 1979); Segar v. Smith, 738 F.2d 1249, 1293-94 (D.C. Cir., 1984) petition for cert. filed, 53 U.S.L.W. 3567 (U.S. Feb. 19, 1985); Thompson v. Sawyer, 678 F.2d 257, 294 (D.C. Cir., 1982); Palmer v. District Board of Trustees, 748 F.2d 595, 600 (11th Cir., 1984).

affirmative action, the U.S. Government would be at the forefront of an historic civil rights retreat.

F. The Importance of Relying on Statistical Evidence of Discrimination

We have touched above on the importance of statistical evidence of discrimination, and the 50-year line of Supreme Court cases relying on statistical proof of discrimination. There is simply no room for reasonable argument on this question.

Notwithstanding the clarity of the law, some officials of this Administration seem to have a personal dislike of statistical evidence, and they seem to be willing to override the law with their own personal preferences. For example, Chairman Thomas of the Equal Employment Opportunity Commission has stated that the EEOC has relied too heavily on statistical proof, and that he wants the agency to place much less reliance on statistical proof in the future.[64] We are informed that, at some local offices of the EEOC, they believe they are no longer allowed to rely on statistical proof in determining whether there is reasonable cause to believe a charge of discrimination is true. The draft executive order's ban on statistical evidence is just another example of this type of personal predilection.

In point of fact, many of the critical comments about statistics and adverse impact reflect a basic misconception of

---

[64] New York Times, December 3, 1984, pp. 1, B16. A copy of the article is attached to the December 14, 1984 testimony as Attachment D.

the law and of practice. The statements often refer to a parade of horribles which has no basis in reality---that courts and the Commission routinely find employers liable for violating Title VII on the basis of raw statistics, without ever giving the employer a chance to explain that the numbers are incorrect, or that there is a nondiscriminatory explanation---such as, that many of the minority applicants are too young to be hired, or are still in school. In reality, there is no such problem. As Judge Friendly of the Second Circuit observed twelve years ago:

> We must not forget the limited office of the finding that black and Hispanic candidates did significantly worse in the examination than others. That does not at all decide the case; it simply places on the defendants a burden of justification which they should not be unwilling to assume.

Statements disapproving the use of statistics in establishing adverse impact, and the insistence on anecdotal proof instead, would tend to render Griggs a dead letter. It is hard to understand how any plaintiff could prove that a test or other selection standard disproportionately excludes members of minority groups or women unless one counts the applicants and the selections. Chairman Thomas' approach would make it hard ever to get to the point at which an employer would have to justify its practices. Vulcan Society of N.Y. City Fire Dept. v. Civil Service Commission, 490 F.2d 387, 393 (2nd Cir., 1973). The Supreme Court made the same observation in 1977, in the course of holding that unrebutted statistics can in and of themselves prove employment discrimination, without the need for any further

proof. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 339-341 (1977). The Court quoted a decision of the Eighth Circuit:

> "...In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination by the employer or union involved." United States v. Ironworkers Local 86, 443 F.2d, at 551.

431 U.S. at 339 n. 20.

For the Commission or OFCCP to turn their backs, even partway, on such a necessary tool of proof would blind them to the discrimination actually revealed in their cases, would blind them to the most persuasive evidence of nondiscrimination an employer could offer, and would produce results in the administrative processes which would vary, in a completely arbitrary manner, from the results a court would reach. Such arbitrary results would benefit no one, and would vastly increase the burdens on businesses attempting to comply with the law.

G. Conclusion

The Executive Order program has historically been the government's greatest weapon against job discrimination. It has long suffered from inadequate enforcement, particularly during the tenure of Secretary Donovan.[65] Under the leadership of Secretary Brock, Deputy Under Secretary Heisinger, and Mr. Cooper, we had had strong hopes that the program would be stepped up and come closer to its potential.

---

[65] See, for example, the September 30, 1985 report of the Office of Inspector General, U.S. Department of Labor, OFCCP Can Do More Enforcement and Have Greater Impact Using Fewer Dollars.

The attempts of some Administration officials to kill the program by eliminating enforceable requirements for goals and timetables to remedy problems of potential discrimination, and by barring the Labor Department from considering the actual actions of employers in hiring and promoting minorities and women, have raised the most serious questions to come before the Department of Labor for many years. No issue of greater importance is likely to arise during Secretary Brock's tenure, and we submit that the success of his tenure will stand or fall on his ability to protect the present Executive Order program and to make it fully effective.

THE NEW YORK TIMES, FRIDAY, NOVEMBER 1, 1985

Rights Chief Assails Hiring Goals as Failure

By ROBERT PEAR
Special to The New York Times

WASHINGTON, Oct. 31 — Assistant Attorney General William Bradford Reynolds today denounced the Government's affirmative action program for Federal contractors, saying had kept "deserving blacks" and women from being hired.

The Reagan Administration is determined to revise the program, Mr. Reynolds, who is in charge of civil rights enforcement, said in a speech to the Rotary Club in Wilmington, Del. "In plain language," he said, "it's broke and needs fixin'."

President Reagan is weighing a recommendation from the Justice Department to eliminate numerical hiring goals for companies that do business with the Government.

Under current rules, contractors must make "good faith efforts" to hire and promote workers who are black, Hispanic or female in rough proportion to the numbers of available qualified candidates in a given labor market.

It Is 'Outlawed,' He Says

"Call them goals, quotas, ratios or what you will," said Mr. Reynolds, "the fact remains that any such numerical device that prefers some over others for racial reasons is outlawed discrimination."

Moreover, he said women and members of minority groups had fared worse when they were employed by Federal contractors than when they worked for private companies not covered by these requirements. "The bureaucracy's preoccupation with statistical balance has served many times to prevent deserving blacks and females from being selected or advanced, out of a concern over disturbing the accepted equilibrium," he said.

Mr. Reagan's key domestic policy advisers held an impassioned debate on the subject last week and, after failing to agree on a single recommendation, sent him three choices, one of which is the Justice Department's. People at the meeting said that Secretary of Labor Bill Brock, whose department administers the program, had argued against major changes in the 1965 executive order that provides legal authority the program.

The title of Mr. Reynolds's speech today was, "Minorities Have Civil Rights, Too." A Justice Department spokesman, John V. Wilson, said Mr. Reynolds was saying "for the first time that civil rights leaders have been espousing policies that discriminate against their constituents."

Is it not obvious, Mr. Reynolds asked, that a system of hiring goals and timetables infringes impermissibly upon "minority civil rights"?

"The current leaders of the civil rights lobbying groups insist not, and in ostrich-like fashion they have just recently announced their rededication to resurrecting remedies that prefer by race, sex or national origin," Mr. Reynolds said. "As they see it, the only viable civil rights policy is one that marches under the banner of 'discrimination to end all discrimination.'"

Ralph G. Neas, executive director of the Leadership Conference on Civil Rights, a coalition of 165 organizations, dismissed Mr. Reynolds's statements as "pure poppycock."

"We support the civil rights policies that have been enforced by every Republican and Democratic administration over the past half-century," Mr. Neas said. "Brad Reynolds is a rigid ideologue, and that ideology blinds him to the law, the facts and history."

Mr. Reynolds said, "In the overzealous effort to strike a racial balance, or at least achieve proportionality, too many involved in the manipulation of numbers, inside and outside Government and on and off the bench, seemed to forget that minorities have civil rights, too."

The "racial numbers game," Mr. Reynolds said, "takes away human dignity and individual worth."

In addition, he said, workers hired under "a special set of preferential rules" bear the stigma of being "affirmative action employees," even if they were qualified for their jobs.

[ATTACHMENT A]

[ATTACHMENT B]

Department of Justice

ADDRESS

OF

WILLIAM BRADFORD REYNOLDS
ASSISTANT ATTORNEY GENERAL
CIVIL RIGHTS DIVISION

BEFORE

WILMINGTON ROTARY CLUB

12:00 NOON
THURSDAY, OCTOBER 31, 1985
WILMINGTON, DELAWARE

MINORITIES HAVE CIVIL RIGHTS, TOO

It is indeed a pleasure to be here with you today. Thomas Wolfe was wrong: You can go home again -- and it is always good to do so.

During the past few years, I have had many occasions to speak about the Reagan Administration's policies on civil rights and the proud record of the Justice Department in enforcing the many Federal laws in this area. At any given time, the focus has been on quota relief masquerading under the misnomer of "affirmative action", or forced busing as a misused tool of school desegregation, or proportionality as an inappropriate measure of voting rights. But in every instance, the theme has remained the same: equal treatment of all individuals without regard to race, color, sex, religion or national origin is a moral, legal and constitutional imperative. To prefer some and disadvantage others on the basis of skin color, gender, religion or ethnic background offends our most basic values. It cannot and will not be tolerated.

Regrettably, in recent years the public debates in this field have served to obscure as much as they have clarified. Too often, the position I just articulated has been mischaracterized as anti-black and anti-women. Our critics take delight in misrepresenting the Administration's civil rights policies as

preoccupied with the problem of "reverse discrimination," with protecting only white males. Such a sophomoric retort to so serious a matter as civil rights could be laughed aside if it were not so clearly reflective of a deep and fundamental misunderstanding of first principles. Let me therefore take a few minutes to address the criticism. (And while my remarks will focus for the most part on the racial context, they could just as easily have been fashioned to address the problem in a gender context or one concerning national origin.)

At the outset, I will separate myself from the term "reverse discrimination," since it offers little (if anything) of independent value to our understanding of the basic issues. The essential point is that, in reality, there is only discrimination, pure and simple, whether it operates in forward gear or in reverse. The behavior condemned in every case is the preferential treatment of some, to the disadvantage of others, because of their skin color, be it white, black, brown, red or yellow. We all have a civil right to be free from such discriminating practices; when they are directed against any one of us, we all are demeaned. The inescapable conclusion is that there simply are no winners under a racially preferential program (however devised), only losers.

In order to better understand this truism, we need only to harken back to our past.

From our very beginning as a nation, we have been committed to the notion of rights. In our first great public expression, the Declaration of Independence, Thomas Jefferson spoke the

language of enlightened men everywhere. "All men," Jefferson proclaimed, "are created equal; they are endowed by their Creator with certain inalienable rights; ... to secure these rights, Governments are instituted among men, deriving their just powers from the consent of the governed."

Yet, while we as a nation committed ourselves at the level of principle to the idea of human equality, history reveals all too graphically that, in practice, we fell short. Thus, the basest of human institutions, slavery, was openly encouraged in a land dedicated to such lofty principles. Jefferson and the Founders knew it; and while they never accepted slavery at the level of principle, they were compelled by political realities to tolerate the presence of that "peculiar institution" at the level of practice. Jefferson spoke a common sentiment when he described the American dilemma: "We have a wolf by the ears and can neither safely hold him nor safely let him go."

It fell to a later generation of Americans to grapple with resolving the terrible dilemma between slavery and the idea of equality. As Abraham Lincoln prophesied, "'A House divided against itself cannot stand'... this government cannot endure permanently half slave and half free. I do not expect the Union to be dissolved -- I do not expect the house to fall -- but I do expect it will cease to be divided." For Lincoln, there was no "middle ground between the right and the wrong." It took a bloody and wrenching civil war ultimately to resolve that irreconcilable contradiction. But resolve it we did -- in favor of equal liberty for all.

The Civil War did not, of course, secure unequivocally the notion that all are equal. There were those who refused to accept defeat and continued to treat the former slaves as though they had not been freed. The social shackles of discrimination remained after the iron chains of slavery had been removed.

When Congress undertook to pass legislation to secure the civil rights of the freedmen, there was grave concern that the Supreme Court of the United States would declare any such laws unconstitutional. Thus Congress proposed and the States ratified three amendments to the Constitution, the 13th, 14th, and 15th amendments. By the terms of the 13th amendment, there could no longer be slaves; by the terms of the 14th, the states could be prohibited by Congress from denying any person the privileges or immunities of citizenship, due process of law, and the equal protection of the laws; and by the 15th, the vote was secured for the former slaves. In this fashion, the Constitution was thus made to embrace the fundamental principle of equality that was originally the core of the American philosophy of politics.

Or so everyone thought.

But, then, in stepped the Supreme Court and undertook to nullify our most basic principles. Indeed, by 1896 in Plessy v. Ferguson, the Court could hold that separating people on the basis of race did no damage to the idea of equal protection of the laws. The noxious doctrine of Separate-but-Equal won out over Justice John Marshall Harlan's impassioned dissent that our Constitution is, and must be understood to be, "colorblind."

It was not until 1954 that this doctrine of Separate-but-Equal was finally abandoned, with the Supreme Court's landmark decision in Brown v. Board of Education, and we again returned as a nation to the proper, moral and constitutional track. Indeed, it seems safe to say that Brown was the legal spark that ignited the general moral conflagration that was the Civil Rights Movement of the 1950s and 1960s.

Throughout that period, our nation moved forward, slowly at first, then picking up a moral momentum that was finally to push us toward a true restoration of the principle of equality and the practice of non-discrimination. By the mid-1960s, we had molded this fresh public morality into laws, civil rights laws with teeth in them. No longer would individuals be denied their basic right to equal liberty. Henceforth each person would have the freedom to live his life as he or she might choose without legally imposed burdens based on race.

Or so everyone thought.

But somewhere along the line, in the 1970s, things started to change once again. The Civil Rights movement began to settle comfortably into the institutional environment of Washington. Some of those who had been in the forefront of the battle for equal opportunity began to pursue policies calculated to compromise that principle for which so many had fought for so long; they embarked on a misguided venture to find shortcuts to achieve the fruits American society has to offer.

The consequences are well known to us all: the cherished ideal of equality of opportunity gave way in many quarters to a drive for a new kind of equality -- an equality of results. And civil rights successes and failures came to be measured on the basis of statistical balance or imbalance.

To count by race or gender -- whether the effort is to fill neighborhoods, schools or jobs -- rests on the shakiest of legal foundations. Three cases now pending before the Supreme Court should do much to clarify this aspect of the debate. But, it is not the law that I want to address today. It is something far more fundamental. For, what the decade of the seventies has given us -- with its overuse of numerical remedies as an ostensible cure for past discriminations -- is a callous disregard for minority rights. In the overzealous effort to strike a racial balance (or at least achieve proportionality), too many involved in the manipulation of numbers -- inside and outside government and on and off the Bench -- seemed to forget that minorities have civil rights, too.

The evidence is overwhelming. With Brown v. Board of Education, for example, we promised black students desegregation and education. They got instead long bus rides to distant schools that provided little discipline and only mediocre instruction. Ironically, the heaviest burden of Brown was placed squarely on the shoulders of those supposed to be its beneficiaries. And, to what end: there has been more resegregation than desegregation; too much attention on forced transportation and too little on quality education. Minority

civil rights have not been well served. Is it, therefore, any wonder that, while the current leadership of the civil rights advocate groups continue to clamor for forced busing, the latest polls show that a clear majority of the black community is fed up with that remedy?

They are fed up as well with the far too prevalent practice of moving minority children through the public school system, and, in some instances through colleges, without providing the basic skills needed to compete with other graduates. A diploma means nothing if the knowledge is lacking. Too often, educators have soft-peddled the instruction given to minorities, preferring to ignore glaring deficiencies in the most elementary of learning skills so as to insure that the "proper" racial balance is maintained in the classrooms or graduating class.

There are other techniques as well: assigning minority students to special education programs or channeling them into non-academic curricula. Just recently, a federal district court in Texas ordered a lowering of testing standards in order to insure acceptance of a proportionate number of minority participants in a graduate teaching program. Thus the preoccupation with racial numbers comes full circle: the minority student with a short-circuited education but a high school and college degree is advanced to a teacher's education program by lowering the admissions standards. With the obvious learning deficiencies so benevolently "papered over", he or she becomes the instructor for the next generation of school kids desirous of a meaningful education.

This is admittedly not "reverse" discrimination; it is perverse discrimination. Can it seriously be maintained that minority civil rights are being well served by such preferential treatment? The latest polls shows that, despite the contrary view of the civil rights leadership, more than 75 percent of the black community think not.

Nor can employment of a certain number of minorities under a scheme of preferential selection -- whether it be a racial quota, a goal-and-timetable, or any other similar device -- cure the educational ills. Indeed, if anything, resort to such numerical remedies serves only to exacerbate the problem.

For, to choose some over others because of skin color demeans those chosen no less than those turned away. The Hispanic firefighters in Miami, Florida, who recently refused promotions that were the product of a minority quota preference, made the point for many. They did not want the irrelevancy of race to determine their lot in life; if they were to get ahead, they wanted to know it was on merit, for a job well done.

The racial "numbers game" denies that to them, and to others. It takes away human dignity and individual worth, leaving each person with no more of an identity than membership in a particular group. Advancement or failure turns almost entirely on how many of that group makes up its proportionate share of the social pie -- and who is or is not fortunate enough to have one of the low numbers.

Call them goals, quotas, ratios (or what you will), the fact remains that any such numerical device that prefers some over others for racial reasons is outlawed discrimination. And it offends when used to deny deserving nonminorities positions that, on merit, should go to them (be it a lieutenant on the police force or a student vying for a position on the Harvard Law Review) just as surely as when minorities are told that the quotas have been filled and no more blacks, Hispanics or Asian-Americans are welcome (be it at the Starrett City housing project in New York City or under Princeton University's admissions policies).

To label such preferential treatment "affirmative action" insults common intelligence. Just look, for example, at the OFCCP program for federal contractors under Executive Order 11246. That is the so-called "affirmative action" program which has received press attention recently because the Administration has targeted it for revision. In plain language, "it's broke and needs fixin'." Under the Executive Order's current regime of rules and regulations, those who contract with the Federal Government must see to it, through racial and gender-conscious hirings and promotions, that no job unit within their work force is "underrepresented" -- that is, if it wants the contract continued.

And how have minorities and women fared under this "affirmative action" program? Not nearly so well as they have done in the private sector without OFCCP interference. For, the bureaucracy's preoccupation with statistical balance has served

many times to prevent deserving blacks and females from being selected or advanced out of a concern over disturbing the accepted equilibrium. Such discriminatory action -- and it is discriminatory when the denial (even if aimed at maintaining a "balanced" or proportionate work force) is due to gender or skin color -- can hardly be called "affirmative." Nor do those who are selected view their "good fortune" as entirely affirmative. They made it into the work force under a special set of preferential rules, and the stigma of being an "affirmative action" employee is hard to shake, even for the most qualified. Nor is it made any easier when most of the federal contractors' minorities and women find themselves working in the company's EEO office, but only sparsely represented in most other areas of the work force.

Is it not obvious that such a regime trenches impermissibly on minority civil rights? Is it not equally obvious that quotas, preferential goals-and-timetables, or other such techniques that similarly "buy into" the notion of proportionality, undermine rather than promote minority interests? The current leaders of the civil rights lobbying groups insist not, and in ostrich-like fashion they have just recently announced their rededication to resurrecting remedies that prefer by race, sex or national origin. As they see it, the only viable civil rights policy is one that marches under the banner of "discrimination to end all discrimination."

But the most recent polling data shows that over 77 percent of the black community holds a contrary view. Their interest is not in preferential treatment, but in equal treatment. They too are human beings (not simply statistics that exist for the convenience of filling a goal or quota) and they want to be regarded as such, with the same degree of respect as is afforded all other Americans. At the heart of the matter is human dignity, the knowledge that they are being measured by the same standards, that they are being allowed to play by the same rules, and the satisfaction of being able to show that they can make it in their own right because of the content of their character not the color of their skin.

Let me share with you the mood of this emerging attitude among large numbers of minorities in this country -- a mood eloquently captured by Glenn Loury in a recent article he wrote. He stated that

> black Americans cannot substitute judicial and legislative decree for what is to be won through the outstanding achievements of individual black persons. That is, neither the pity, nor the guilt, nor the coerced acquiescence in one's demands -- all of which have been available to blacks over the last two decades -- is sufficient. For what ultimately is being sought is the freely conveyed respect of one's peers. Assigning

> prestigious positions so as to secure a proper racial balance -- this as a permanent, broadly practiced policy -- seems fundamentally inconsistent with the attainment of this goal. It is a truth worth noting that not everything of value can be redistributed. [Emphasis added.]

America's promise is that every individual in this land will have the opportunity to become all that he or she can become. It is that promise which has lured countless waves of immigrants to our shores. They have come seeking not a free ride or a guaranteed way of life, but rather the chance -- the opportunity -- to be all that they can be, to achieve all that they can achieve.

The civil rights policies that have been pursued over the past four and a half years by this Administration have been particularly responsive to this vision.

We confronted the overwhelming evidence of failure in community after community that was ordered by a well-intentioned but largely misguided judiciary to put the yoke of forced busing on the backs of black parents and students. Our answer was a comprehensive, alternative desegregation program, one that uses magnet schools and educational incentives to accomplish desegregation. Brown v. Board of Education said minorities have civil rights, too -- and we devised a remedy that has finally given life and meaning to that promise.

We have confronted the educational inadequacies that are all too commonplace in our public school systems, inadequacies that in many instances place more emphasis on the number of minorities graduating than on the actual knowledge they acquire. Secretary William Bennett of the Department of Education has helped immensely to accentuate the need for sounder educational policies that return the curriculum to basics and provide future generations with the kind of learning skills that will enable them to compete in the job market. Minority civil rights stand at the center of that initiative, and we are responding.

We confronted the divisiveness, the inequities, the inherent contradictions in resorting to quota remedies -- which are themselves discriminatory -- as a cure for employment discrimination. Our answer has been to rebuke preferential hiring and promotion schemes that single out but a select few to enter the job market, based on their skin color, and saddle them for all time with the stigma of "affirmative action" employment -- leaving others with equal or better qualifications, but not fortunate enough to be counted among the chosen, to suffer the sting of racial rejection. This is not a campaign against so-called "reverse discrimination, but one against <u>all</u> discrimination. It is the minorities in this country -- all minorities -- that lose under a regime of racial preference. Their rights are the ones most mistreated if the dream of equal opportunity is overtaken by the nightmare of proportionality.

We have stood fast against those intent on bringing about such a result. The fight has not been easy, nor has it gone all our way. But the principle of nondiscrimination has an enduring quality that has survived a civil war, any number of efforts to redefine and reshape it, attacks from the left and from the right, opposition in the Supreme Court and the Halls of Congress, and any number of other assaults on its character and reputation. It has survived because its fundamental tenet has resisted compromise.

This President and this Administration understands that therein lies the strength of the ideal. The principle of nondiscrimination, if it is to mean anything to anybody, has to mean the same thing to everybody. We cannot compromise the principle and remain faithful to minority civil rights, any more than a compromise keeps faith with the civil rights of all others. For once that course is taken, the principle is no more; all that is left is the compromise. I can assure you that this Administration will not allow that to happen.

Thank you.

[ATTACHMENT C]

EXECUTIVE ORDER

Section 1:

By the authority vested in me as President by the Constitution and statutes of the United States, and in order to further the purposes of Executive Order No. 11246, which mandates that contractors with the federal Government "not discriminate against any employee or applicant for employment because of race, color, religion, sex, or national origin," it is hereby ordered that the following subpart is added to Part II of Executive Order No. 11246:

Subpart F - AFFIRMATIVE RECRUITMENT AND TRAINING PROGRAMS REQUIRED PURSUANT TO REGULATIONS OF THE SECRETARY; PREFERENTIAL TREATMENT NEITHER REQUIRED NOR GIVEN A LEGAL BASIS BY THIS EXECUTIVE ORDER.

Sec. 216 Each Government contractor and subcontractor shall engage in affirmative recruitment and employment-related training programs designed to ensure that minorities and women receive full consideration for hiring and promotion. Such affirmative programs shall be developed pursuant to regulations promulgated by the Secretary of Labor, and shall describe the actions to be taken, including timeframes for taking such actions, to accomplish the objective of expanding the number of

qualified minorities and women who receive full consideration for hiring and promotion.

Sec. 217 Nothing in this Executive Order shall be interpreted to require or to provide a legal basis for a Government contractor or subcontractor to utilize any numerical quota, goal, or ratio, or otherwise to discriminate against, or grant any preference to, any individual or group on the basis of race, color, religion, sex, or national origin with respect to any aspect of employment, including but not limited to recruitment, hiring, promotion, upgrading, demotion, transfer, layoff, termination, rates of pay or other forms of compensation, and selection for training, including apprenticeship. Nor shall any Government contractor or subcontractor be determined to have violated this Order due to a failure to adopt or attain any statistical measures. Further, nothing in this Order shall be interpreted to require or provide a legal basis for any Government contractor or subcontractor to exclude or in any respect limit the participation of any individual in any recruitment or training program on the basis of race, color, religion, sex, or national origin.

Section 2:

(a) The Secretary of Labor shall immediately revoke all regulations and guidelines promulgated pursuant to Executive Order No. 11246 inconsistent with this Order in that they require or

provide a legal basis for a government contractor or subcontractor to use numerical quotas, goals, ratios or objectives, or otherwise to discriminate or grant such preferences as described in Section 217.

(b) The Secretary also shall, within 30 days of the effective date of this Order, issue such further regulations as are necessary to carry out the purposes of the Order which, where necessary for the integrity of ongoing programs, may be in the form of interim final regulations to be applicable during this interim period. Such regulations shall:

(1) ensure that the requirements of Section 216 will be met by Government contractors and subcontractors; and

(2) provide that compliance with this Order shall be determined on the basis of each Government contractor's and subcontractor's demonstrated nondiscriminatory treatment of its employees and potential employees without regard to race, color, religion, sex, or national origin, irrespective of the number of minorities and women recruited, trained, hired or promoted by the contractor or subcontractor.

Section 3:

This Order shall become effective immediately.

[ATTACHMENT D]

THE NEW YORK TIMES, MONDAY, DECEMBER 3, 1984

The New York Times

Clarence Thomas heads panel on equal employment opportunity.

CHANGES WEIGHED IN FEDERAL RULES ON DISCRIMINATION

EMPLOYMENT IS AT ISSUE

Businesses Asking Revision in Role of Statistics, but Rights Groups Differ

By ROBERT PEAR
Special to The New York Times

WASHINGTON, Dec. 2 — Federal officials have begun an extensive review of whether to change the guidelines used to detect patterns of discrimination in employment against blacks, women and Hispanic Americans.

Business groups support the effort to change the rules and civil rights groups oppose it, for similar reasons: They believe the changes would make it easier, in enforcement proceedings, for employers to defend the proportion of women or members of minority groups in the work force at factories, offices or other places.

Officials of the Equal Employment Opportunity Commission, the United States Commission on Civil Rights, the Federal Office of Personnel Management and the Justice Department are reviewing the guidelines. They apply to all public and private employers with 15 or more workers.

'Serious Reservations' Expressed

Clarence Thomas, chairman of the Equal Employment Opportunity Commission, said he had "serious reservations" about the existing guidelines because they encouraged too much reliance on statistical disparities as evidence of employment discrimination.

Civil rights groups, who say they see no reason to change the existing rules, say the changes contemplated by the Reagan Administration would make it more difficult for women and members of minority groups to prove discrimination.

The rules, or the Uniform Guidelines on Employee Selection Procedures, were issued jointly following extensive hearings adopted by the employment commission in 1966 and 1970.

Enforcing 1964 Rights Law

Courts defer to the guidelines as an authoritative interpretation of the Civil Rights Act of 1964, the basic statute prohibiting job discrimination, and the law is put into effect through applications of the guidelines to specific situations.

The rules could be changed by the Equal Employment Opportunity Commission. No action by Congress would be required.

The basic principle of the existing guidelines is that any test or selection procedure that has an "adverse impact" on a particular race, sex or ethnic group is illegal unless it can be justified on the basis of "business necessity." A procedure having an adverse

Continued on Page B10, Column 3

Changes Are Weighed in Federal Rules on Discrimination in Hiring

Continued From Page A1

imposed "unless discrimination exists [illegible] justified," the guidelines say.

The guidelines apply to "all selection procedures used to make employment decisions" including interviews, applications, forms, physical requirements and evaluations of performance. They apply to decisions about hiring, promotion, transfer and dismissal.

Under the guidelines, if the selection rate for blacks is less than 80 percent of the rate for whites, that is taken as evidence of adverse effect and may justify further investigation by the Government. The same would be true if the selection rate for women was less than 80 percent of that for men.

The guidelines say that Federal agencies will generally be guided by the "80 percent rule," and offer this example:

If 80 whites apply for a job and 48 are chosen, the selection rate is 60 percent. If 40 blacks apply and 12 are hired, their selection rate is 30 percent. Since the selection rate for blacks is half that for whites, there is evidence of adverse impact. To reach 80 percent of the rate for whites selected, the employer would have to hire 20 of the 40 blacks.

The employer may try to explain the disparity, for example, by arguing that most of the black applicants are still in school and too young to be hired.

In an interview Mr. Thomas, the chairman of the equal employment commission, said the review of the guidelines was "the No. 1 item on my agenda."

"We at the commission have applied the 80 percent rule too rigidly, too inflexibly," Mr. Thomas said, "and we have an obligation to go back and correct it."

He said the agency had relied too heavily on statistics in investigations initiated by the commission itself and in its review of complaints filed by individuals. For example, he said, a case filed by the commission in 1979 against Sears, Roebuck & Company, still pending in a Federal court, "relies almost exclusively on statistics" to show discrimination against women.

"If a predominantly white college, such as Georgetown University, has a black basketball coach, you can't automatically assume that there was discrimination against whites," Mr. Thomas said.

Mr. Thomas said Business organizations said the "80 percent rule" had been intended merely as a guide, but that it was applied in practice as a rigid standard. Since he took office in May 1981, Mr. Thomas said, he has been troubled by the use of statistics in 80 to 100 cases.

Statistics 'Terribly Overused'

"It's not that statistics are bad," Mr. Thomas said. "But they have been terribly overused. Every time there is a statistical disparity, it is presumed there is discrimination." In fact, he said, the disparity is often explained by other factors such as culture, educational levels, "previous events" or commuting patterns.

Civil rights groups said courts had usually insisted on further evidence, to show that statistical disparities were intentional and real, not random or accidental, before deciding whether an adverse effect exists.

Linda Chavez, staff director of the Civil Rights Commission, said the guidelines needed to be changed because they put pressure on employers "to eliminate valid tests in favor of quota selection."

She asserted that "the guidelines actually hamstring the employer wanting to hire qualified individuals by forcing him to think in terms of race."

The use and misuse of racial statistics has become a major issue in civil rights debates. In a new book, Thomas Sowell, the economist, condemned the notion that "statistical disparities imply discrimination." In fact, he said, such disparities are "commonplace among human beings" for "many historical and cultural reasons."

Move Emphasis on Conduct

Mr. Thomas said he did not flatly oppose all use of statistical evidence. But he said there should be less reliance on statistics and more use of other forms of evidence based on actual conduct, such as oral testimony from witnesses telling "what happened to me." Other acceptable evidence, he said, would include a company's statements of hiring policy or height and weight requirements, if that excluded women.

Business groups said the guidelines had forced employers to spend millions of dollars to have tests and other selection procedures validated to prove that they help predict a person's performance at a particular job. The Equal Employment Advisory Council, a coalition of 300 big companies, said that requirement imposed "excessive costs" on employers without expanding opportunities for women or members of minority groups.

In addition, companies contend that the guidelines have hampered productivity by discouraging the use of tests and making it more difficult for them to identify the best-qualified applicants.

Supporting this argument, Frank L. Schmidt, a research psychologist at the Federal Office of Personnel Management, said: "A major reason for the marked decline in U.S. productivity growth in the last few years is the decline in the accuracy with which employers have been sorting people into jobs. This decline in accuracy is caused by substantial reductions in the use of valid job aptitude tests."

Changes in Theory on Tests

Mr. Schmidt said the Federal guidelines incorporated many "false theories" about industrial psychology and the cultural bias of tests. "The theories may have been plausible in 1978, but have since been discredited," he said.

A principal committee of the American Psychological Association has called for revision of the guidelines, saying they did not reflect the latest research on psychological testing.

Prof. Wayne F. Cascio, a psychologist at the University of Colorado, said the guidelines now required that each of two cities using the same test to select bus drivers must do separate studies to show the test accurately forecasts job performance. Recent research, he said, indicates that only one study is needed if the jobs in the two cities are similar.

Another expert on psychology and testing, Prof. Fritz Drasgow of the University of Illinois at Urbana-Champaign, said: "The guidelines are somewhat out of date, but given the Reagan Administration's record on civil rights, I would be very concerned about any revision. I'm afraid that many of the gains made toward equal employment opportunity would be lost because of political decisions rather than scientific evidence."

Civil rights groups said the type of changes contemplated by the Administration would reverse two decades of progress toward greater employment opportunities for women and minorities.

Richard T. Seymour of the Lawyers Committee for Civil Rights Under Law said: "The review of the guidelines is undesirable and unnecessary and will sow a lot of needless confusion. The Administration is wasting its energies pursuing far-fetched ideas without much basis in law or reality. The attack on testing standards and the use of statistics seeks to overturn 20 years of policy positions accepted by two Republican and two Democratic administrations, by the courts and by Congress."

Barry L. Goldstein, a lawyer at the NAACP Legal Defense and Educational Fund Inc., said statistical evidence was essential in many job discrimination cases. Moreover, he said, "There is no basis for questioning its use."

Tony E. Gallegos, a member of the Equal Employment Opportunity Commission, said the guidelines could be made more understandable and "less burdensome for employers."

In recent years, the commission has sought to remedy civil rights violations by encouraging employers to set numerical goals and timetables for hiring black, female and Hispanic workers. But in the interview, Mr. Thomas said it was essential to find other, more creative and effective remedies.

For example, he said, the commission might ask a Federal judge to remove the personnel director of a company found to have engaged in discrimination. "The people who put in place the discriminatory personnel practices should be removed from office," he said. "The company should bring in new people."

Civil rights lawyers expressed skepticism about this approach, saying they knew of no precedents or legal basis for it. Mr. Thomas said he was not sure whether the remedy was authorized by Federal law but would "explore it."

The chairman also said recent decisions of the Supreme Court may have "drawn into question" landmark rulings in cases such as Griggs v. Duke Power Company, decided in 1971. In that case, the Court said that even in the absence of discriminatory intent a job test that had the effect of excluding blacks was prohibited unless it was clearly related to job performance.

In applying that precedent, Mr. Thomas said, it is important to remember that "recent Supreme Court decisions preclude preferential treatment for anyone who was not actually found to be a victim of discrimination."

Mr. EDWARDS. Mr. Sensenbrenner.

Mr. SENSENBRENNER. Thank you, Mr. Chairman.

Now, Mr. Robinson, you are a very competent counsel and a very eloquent advocate for the committee on which you serve. Let's suppose for a minute that, instead of your being in your present position, you were out in private practice, in a small- or medium-sized city, anywhere in the United States, and one of your clients was a contractor that fell under the provisions of the Executive order, and he came on in to see you, and he said,

> Bill, I've got a little problem. I want to get involved in Government contracting, because it'll help my business out and allow me to make some more money, but I've got to get involved in this affirmative action business. Now, I don't have the money to pay you a large fee to defend me all the time, and I also don't have the money to hire one or two more people in my company to keep all of the records that are required to show good faith, the 40 points that are imposed according to the regulations, and you have to comply with all 40 or you can't demonstrate a good-faith defense. So, Bill, can you tell me as a counsel what the cheapest way out for me to go is, so that I can get the Government contracts and not have to pay you the large fee or hire a couple more people to take care of all these records that are required by the regulation.

If your advice would be based upon how to cut costs, and yet comply with the law, would you advise to go the quota route as a defense?

Mr. ROBINSON. No, I would not.

Mr. SENSENBRENNER. How do you show good faith without running up a mammoth legal bill that the contractor really cannot pay?

Mr. ROBINSON. Well, Mr. Sensenbrenner, as a lawyer you know I am not going to argue against lawyers getting paid a reasonable fee.

Mr. SENSENBRENNER. Oh, you won't find any argument from anybody on this committee, sir. [Laughter]

Mr. ROBINSON. No, but——

Mr. SENSENBRENNER. However, counsellor, you know that billing is one thing and getting paid is another, it's——

Mr. ROBINSON [continuing]. Often a problem.

Look, I'm not going to sit here and deny that there have been problems with respect to how any particular employer or contractor has been dealt with as part of a compliance review, as part of the requirement for a showing of that good-faith effort: there have been problems in that respect. The regulations in some respects obviously need updating and fine-tuning. The regulations that we're operating under now were regulations adopted back during the Nixon administration, a step forward at the time, but at this point obviously in need of updating in any number of respects to bring us into compliance with various subsequent Court decisions, and of better thinking today as opposed to over 10 years ago.

Coming back to your hypothetical, however, I would advise that client—first I'd want to take a look at the operation, and see how was he operating, what steps was he taking in order to engage in good-faith nondiscrimination hiring that offered minorities and women a fair opportunity for employment, and work with that employer in putting together what I felt we could defend as a good-faith effort. And then we would go with that, and if we had to get subjected to a review, and we couldn't meet the other, I would chal-

lenge it, and I would take the appeal, and I would come down to Washington and try to get in front of one of those employees at the Department of Labor who I could talk to. I know that has happened, Mr. Sensenbrenner, on any number of occasions, and where that lawyer sat down and said, look, here's what we're doing, look at our program, it is reasonable and in good faith, is it in compliance with the law? I've, on any number of occasions, seen that program get accepted.

I can't say that it happens all the time. There, to repeat my earlier comments, have been some problems, but that's what I would do with my client.

Mr. SENSENBRENNER. There's been quite a bit of testimony that the easy way out and the cheap way out in terms of cutting your overhead costs is simply to let the goals and timetables contained in the Executive order and the regulations ripen into quotas, and one of the reasons that this is such an issue today, and I think why we're here this morning at this hearing, is because of the significant public opposition to racial or sexual quotas in the hiring process. I am personally opposed to the racial or sexual quotas, and I think most people are, but the debate is is how to provide affirmative action and an equal employment opportunity.

Now, several years ago the Prudential Insurance Co. testified before the Labor and Human Resources Committee over in the Senate that they spent $1½ million putting together a defense when a charge was levied against them, and ended up being exonerated. Now, I would guess that Prudential has got a lot deeper pockets than most of the corporations that fall under this law, and yet this testimony was over 4 years ago, we haven't seen any significant change in the procedures that have come down the pike, and it seems to me that we're putting an undue burden on business that wants to employ women and minorities to prove that they are not discriminating, a financial burden that is really a self-defeating thing.

Now, how do you propose to get rid of that type of financial burden so that we don't have this debate that is becoming increasingly divisive, and we can get on with doing the job?

Mr. ROBINSON. First of all, let me just suggest that business has not responded to this Executive order by across-the-board adopting quotas. The data and the studies that I mentioned earlier, and the commonsense data——

Mr. SENSENBRENNER. That's not my point, Mr. Robinson. My point is is that the small business person who is faced with a huge lawyer bill, or a huge accounting bill, will go to quotas as the easy way out, saying, look, I got 20 percent black and 40 percent women in my shop, and that's my defense, just look at the figures, rather than going through these 40 points of recordkeeping if they don't have a quota as their goal.

Saying that you've got to keep documents in 40 separate areas, 39 won't do, in order to show good faith, in my opinion is a bad-faith regulation.

Mr. ROBINSON. I am not going to agree to you that it is a bad-faith regulation.

I do agree with you that the regulations can be streamlined and improved. I disagree again, however, that the routine reaction has

been to adopt a quota. More likely, the reaction has been to do nothing on the assumption we won't get caught because there's so little enforcement.

That advice would be borne out by the plain facts regarding how many investigations have in fact occurred. If a business is looking at it——

Mr. SENSENBRENNER. Mr. Robinson, how can you say that there is no enforcement when there were 5,000 OFCCP cases last year? That's a lot of enforcement.

Mr. ROBINSON. I don't know where you got your figures showing 5,000 cases.

Mr. SENSENBRENNER. They had 5,000 investigations of small businesses.

I yield back the balance of my time.

Mr. EDWARDS. Well, I represent portions of Silicon Valley where most of the contractors and many of the small businesses have a great deal of Government business, as you might imagine. In the more than two decades that I have represented this area I haven't had one single complaint about the Government's enforcement of affirmative action programs. And I'm at a little bit of a loss to understand why, all of a sudden, this has become such a big deal.

It seems to me that practically all of the evidence has been, for many years that this is a very good American program, that it is in the interests of domestic harmony, and in the best interests of business, and in the best interests of industry.

And, just all of a sudden, out of the blue, in the last 4 years, actually, this has become a much talked-about issue. Why has this suddenly become—this was generally accepted by both political parties, all the Presidents that came along—tell me, why now do we have this great problem which really isn't a problem?

Mr. ROBINSON. I frankly am at a loss as to why we now are in the midst of a debate concerning the basics of the program, Mr. Edwards. It seems to me that all of our experience, not just the civil rights community, but the experience of business, labor, as well as civil rights, would suggest that there is no occasion to call into question the basic principles of the Executive order program, and I am frankly at a complete loss as to why some members of the administration are calling for that now.

On the other hand——

Mr. EDWARDS. I feel the same as when we were struck with 50 letters going out to 50-odd different cities saying tear up your consent decrees, and the cities, to their credit, practically all of them said, Uncle Sam, stay out of our business, we're doing all right, and we have a better city and a better municipality because of these arrangements we have made with these municipal employees.

So, I have real problems with this. It seems to me that there is almost a strawman being set up here just to knock down. You had a question——

Mr. SENSENBRENNER. Mr. Chairman——

Mr. EDWARDS. Yes, go ahead.

Mr. SENSENBRENNER [continuing]. The gentleman from California has said that there don't seem to be very many problems out there, and I would like to ask unanimous consent that the testimony of Steven C. Glenn, senior vice president, Bank of the West, San Jose,

CA, before the U.S. Senate Committee on Labor and Human Resources, July 29, 1981, being inserted in the hearing record at this point.

Mr. EDWARDS. Without objection it will be inserted in the hearing record.

[The information follows:]

BEST COPY AVAILABLE

STATEMENT OF STEPHEN C. GLENN, SENIOR VICE PRESIDENT, BANK OF THE WEST

Mr. GLENN. Thank you very much.

Good morning. My name is Stephen Glenn, and I would like to read an abbreviated version of my testimony, submitting the entire testimony for the record in the interests of time.

The CHAIRMAN. Without objection, all full statements will go in the record after the panel discussions.

Mr. GLENN. By way of introduction, I am a senior vice president of Bank of the West and am speaking as a representative of this bank. My responsibilities at the bank include those of being director of human resources and corporate planning.

I would like to stress at this point that Bank of the West fully supports the concept of affirmative action and providing equal employment opportunities for all protected class members.

In the period from 1975 through 1980 the results of these efforts clearly show in the statistics.

For example, total minority employment at the bank rose 64 percent during that period from 15.3 to 25.1 percent. This compares with an available labor force in our market area of 20.6 percent minorities based on a California Employment Development Department statistics for affirmative action programs.

Minorities in officials' and managers' jobs during that same period of time increased 155 percent from 6.5 to 16.6 percent. This compares with an approximate available labor force based on EDD statistics of 14.5 percent.

During that same period of time women in the bank have also fared very well. The number of women in officials' and managers' positions increased 57 percent from 28.8 to 45.3 percent. This compares with an available labor force of approximately 36.9 percent based on May 1980 EDD statistics.

The OFCCP throughout the review of Bank of the West has never focused on the real results of the programs that have been in place in our bank for several years.

A compliance review was initiated at our bank by the San Jose office of the OFCCP on December 17, 1979. That compliance review was closed on July 7, 1981.

The bank had spent through June 16, 1981, a total of 3,498 manhours on the review with a total cost of labor, computer time and programing, legal and consultant fees, and Xeroxing expenses related to this review in excess of $83,350.

I might add that after preparing the testimony I received an additional bill from my time-sharing computer service for $31,000.

The CHAIRMAN. You are well over $110,000—about $115,000?

Mr. GLENN. That is correct.

Throughout this process the OFCCP has been unable to find any significant deficiencies of any kind in our bank. There was never a question of an affected class, discrimination, underutilization, or lack of progress toward goals and timetables. We were even told by OFCCP that the bank had an excellent reputation with minority agencies and community groups for working with them.

Historically, this is how the review proceeded: On December 18, 1979, we received the OFCCP's standard letter requesting the desk audit information data, with the data to be provided to the OFCCP before no later than January 17, 1980.

The bank routinely prepared the data requested in the desk audit letter and had that information reviewed by the bank's legal counsel—the firm of Jackson, Lewis, Schnitzler & Krupman—who specialize in labor and EEO law.

We were advised by legal counsel that our package of requested data was in compliance with the OFCCP regulations.

The bank then on January 18, 1980, attempted to submit the requested desk audit information. When the information was delivered to the OFCCP offices the Agency refused to accept the data and called us to request that we not submit it at that time.

We then resubmitted the package of information on January 25, 1980, as requested by the OFCCP.

On February 6, 1980, we received a phone call from the person who had been assigned to do the bank review, Mr. Angel Luevano, who asked to set up a meeting to discuss and clarify some of the desk audit information. He indicated that he had some concerns as to whether or not the desk audit submission was reasonable.

The bank scheduled a meeting for February 8, 1980, with Mr. Luevano; the bank's attorney, Mr. Cronin; myself; and Mrs. Lois Larson, the bank's affirmative action officer. This meeting lasted approximately 2 hours.

At this initial meeting we explained the computerized format of our AAP in detail and discussed the organizational structure of our [illegible].

Mr. Luevano discussed the possibility of issuing a show-cause letter and stated that this would also eliminate the 60-day time clock problem.

We reviewed the plan in detail, with our attorney outlining how it complied with the regulations. Mr. Luevano indicated he had some concerns about the appropriateness of the bank's job groupings but conceded that he had never reviewed a bank and was unfamiliar with the jobs, their content, and the industry.

At the conclusion of the meeting we had the impression that we had answered his questions and that it would not be necessary for the Agency to issue a show cause letter.

The next contact from the OFCCP was receipt of a show-cause letter on February 20, 1980. Five working days had elapsed since our meeting with Mr. Luevano and February 18, the date the letter was sent.

I noted the amount of time that was spent with the bank in discussing these issues and the amount of time elapsed, because in a later OFCCP communication and conferences they stressed the extensive amount of time spent in negotiating with the bank prior to the issuance of the show cause letter. This show cause letter erroneously described the bank's workforce analysis and job grouping and stated that it was unacceptable.

The bank met with Mr. Luevano and his supervisor, Mr. Oroz, on February 22 and explained the same information we had covered in our meeting of February 8, 1980. We explained that the OFCCP had erroneously described what we had submitted, which they conceded.

On March 27 we received a letter from Mr. Luevano stating that the OFCCP had completed the desk audit and was coming onsite to complete the review. The letter included a request for a substantial amount of information within 10 days, which allowed only 7 working days.

It should be noted here that the bank was consistently required to incur significant overtime expenses and work staff weekends to meet the unreasonable time-frame deadlines imposed on it by the OFCCP.

Throughout this review the OFCCP utilized its power to request information and reports as a vehicle to harass the bank. The agency was well aware of this tactic.

In a meeting on March 31, 1980, the first day of the onsite, Mr. Luevano told me they had several discussions in their office before coming onsite and were pressuring to see how much information they could collect from the bank.

There were many other examples of this technique during the next 3 weeks while the OFCCP was onsite. For example, on April 22, 1980, in a meeting with Mr. Luevano when we asked why the review of Bank of the West was taking so much longer and requiring us to generate so much more information than any other bank in the State, he told us the following:

He stated that he had not found any serious problems, that he was just very thorough in his approach. He said that he had reviewed the work done at Crocker, Wells Fargo, and Bank of America by the San Francisco office and while he did not like to talk down his own agency those reviews were performed in an inadequate fashion and would have been unacceptable to him or the San Jose office.

BEST COPY AVAILABLE

He went on to state rather proudly that he had earned a reputation in his previous reviews as being difficult to deal with and taking an adversarial approach toward the contractors he was reviewing. He said he did not know why this was so—perhaps it was just his nature.

He stated further that if he really wanted to be difficult he could ask us for information going back to 1972 or even 1968 but he did not intend to in our case because we were cooperative.

He also explained that he was a law school graduate and although he was not an attorney he had a good deal of title VII litigation experience from his previous employment.

His message was clear: If we objected to his tactics he could make it more difficult and expensive for us.

During the 3 weeks of this first onsite we were required to spend hundreds of man-hours reformatting manually information that was computerized and completing statistical analyses that should have been done by OFCCP staff.

On the final review of this first onsite we were advised by the EOS that he had found no serious problem. He went on to say that they would have a meeting that afternoon with his supervisors to discuss Bank of the West's review and determine the agency's course of action.

At 4 p.m. that day I received a phone call from Mr. Luevano who indicated that he had some bad news: The OFCCP had decided to amend the original show cause and found the bank's affirmative action program unacceptable and unreasonable.

The CHAIRMAN. This seems like blackmail or at least intentional abuse, if it is the way you are telling it.

Mr. GLENN. I think there is clear evidence as my testimony moves along—I would characterize it more as extortion.

The CHAIRMAN. I think that is a good characterization. That is exactly what it is.

Go ahead—I am sorry.

Mr. GLENN. This decision he said was based on our job grouping. He stated that he was working on drafting the amendments to the show cause letter and we would receive them within 2 weeks. The bank never has received any amended show cause notice.

The CHAIRMAN. Would you like us to call Mr. Luevano as one of our witnesses in these hearings?

Mr. GLENN. I would have no objection to your doing that, Senator.

The CHAIRMAN. We might want to do that because, my gosh, if this is exemplary of the way these people operate maybe we had better get a few of them up here.

I will just throw out the challenge. I would like to receive the names and formal job designations of anybody at the OFCCP from anybody in business throughout this country who feels they have a legitimate case. They had better make a legitimate case, though, because we are not about to harass them. What we want to do is stop this kind of horse manure that has been going on in our country. It is shocking.

Go ahead.

Mr. GLENN. Our next contact from the OFCCP came 11 weeks later on July 9, when we received a letter from William Gladden, assistant regional administrator in San Francisco.

His letter stated that our AAP was too seriously deficient to conduct a desk audit and they were ready to pursue enforcement. This was despite the fact that they had previously advised us in writing that they had completed the desk audit and they completed an onsite review.

At the conciliation conference held on July 30, 1980, the bank and our attorneys met with Mr. James Southard, chief of operations of the regional office; Mr. James Chen, also from the San Francisco regional office; and Mr. Luevano.

The meeting focused on the bank's job groupings. The bank pointed out that the definition of job groups in the regulations was

in parentheses and that it required that groups of similar content, compensation, and opportunity be grouped together.

We argued, to no avail, that our present grouping met this test. We also cited several banks and savings and loans that this region had recently reviewed and approved with the same job groupings as Bank of the West.

The CHAIRMAN. Excuse me just one second, Mr. Glenn. I am going to run and vote. Senator Quayle will take the testimony, and I will come back so he can run and vote. If he has to leave before I get back, then let us just go on to Mr. Smithwick, and we will get this record made today. Go ahead.

Mr. GLENN. We noted that the OFCCP had approved this format in the widely published Chase Manhattan conciliation agreement. We provided copies of the proposed regulations for the banking industry that the OFCCP had published at the time our bank developed its AAP calling for the same format we provided.

We also provided a copy of the agency's policy issuance ARA 78-17/60-1 directed specifically at contractors with previously approved automated reporting formats. We were advised that all of these facts were not relevant to our case.

We were later told by Mr. Luevano on April 30, 1981, that at this time the region had 29 other approved plans with our salary grade-based types of job groupings.

We asked OFCCP if we changed our format and reprogramed the computer would it be acceptable for our next review. We were told by Mr. Southard that if we changed our job groups this time there could be no assurance that they would be approved in future reviews.

Mr. Chen reviewed our utilization analysis and commented that with 900 people the bank showed a very small number of underutilized job groups; therefore, if we were in that much compliance, our job groupings must be inappropriate.

After threats of enforcement action the bank conceded to amend its job groups and revert from an automated program to a manual one for monitoring progress. We were given 5 days to revise our job groups and submitted a proposed job grouping on August 5, 1980.

We advised the agency that we would provide a revised AAP within 30 days of approval of our job groups. When we heard nothing by September 8, 1980, I wrote Mr. Southard to determine our next course of action and offered to submit a revised program at their convenience.

I received a response from Mr. Cordova of the San Jose office on September 15, 1980, stating that they could not give prior approval to job groups and that our revised AAP was late. We hand delivered it the same day.

This was the last we heard from the San Jose office until March 9, 1981, when we received a phone call from Mr. Luevana. Six months had elapsed.

We received a letter from Mr. Cordova on March 24, 1981, advising us of another onsite review and requesting voluminous information while allowing only 9 working days to complete it.

Another onsite review was initiated April 27, 1981, and concluded in 1 week. Again the agency was unable to identify any significant problems.

We were then presented with a draft of a conciliation agreement and were told we could conclude the review by signing it. It covered the areas impacted by the revised job groups. Mr. Luevano also conceded that the 18 months spent on the review had had no real bottom line impact on the bank's affirmative action posture.

On May 14, 1981, the bank responded to the San Jose office with a letter of commitment that addressed all the issues in the conciliation agreement. It should be noted that all of these changes had already been implemented.

This was accompanied by a legal opinion citing its appropriateness prepared by bank counsel and delivered to Mr. Oroz and Mr. Luevano. They indicated surprise at the bank's response.

BEST COPY AVAILABLE

I received a phone call from Mr. Cordova on May 18, 1981, who indicated that he was surprised that the bank would not sign the conciliation agreement. He questioned why we wanted to challenge their procedures. He said he would not accept a letter of commitment and would move to enforcement. He indicated that if the bank did not sign the conciliation agreement it could cost us another $74,000 and stretch out another 1½ years, possibly 3 years.

He stated he was having his staff reanalyze our data to "make sure they had not overlooked any problems." He said they would do a "thorough offsite analysis" to attempt to detect "additional deficiencies in the bank's AAP." He also noted this would not be necessary if we signed the conciliation agreement.

He compared our review to the *Firestone* case, one he had initiated in Texas. He said that while OFCCP had lost the case he personally viewed it as a victory as it helped clarify the rules. He also noted that it took several years and cost a great deal of money.

He then requested a meeting with McKenzie Moss, the bank's president, to make certain he understood the implications of not signing the conciliation agreement.

On May 26, 1981, a meeting was held at the bank with Messrs. Moss, Cordova, Oroz, Luevano, Cronin, and myself. Mr. Cordova reviewed the case and consequences of not signing the conciliation agreement. Mr. Moss noted that his presentation appeared to be a threat, and the discussion became somewhat heated.

During the discussion, when asked about some specifics in the bank's letter of commitment, Mr. Cordova said that he had not personally read it—it was addressed to him—and that it was still being processed by his staff. He also said that he had not personally reviewed the bank's AAP.

Mr. Cordova stated that the matter was now out of his hands and we could talk to Mr. Gladden, the assistant regional administrator, if we wished.

I telephoned Mr. Gladden's office that afternoon to set up a meeting and again the following day. Neither call was returned. A meeting was eventually set up through Ms. Sanchez of Congressman Norman Mineta's staff. It took place on June 16, 1981, in Mr. Gladden's office in San Francisco.

In attendance at that meeting from the bank were: Mr. Edouard Finot, chairman; McKenzie Moss, president; Lois Larson, assistant vice president and affirmative action officer; Frank Cronin, bank counsel; and myself. Mr. Gladden was present, as was Ms. Lucille Hearne, a member of the OFCCP staff.

During the meeting we reiterated the concerns that we had as to the manner in which the bank's compliance review had been conducted and the tactics that were being used by the San Jose office in their review of Bank of the West.

Mr. Gladden during the meeting indicated that from his file he had on the bank he was unable to determine if an onsite review had even been conducted. He said that he had been briefed on the bank's review by Mr. Luevano and he had instructed him to go back and amend the show cause letter identifying some substantive issues as nothing in the case presented thus far was of any substance.

We requested that Mr. Gladden carefully review the material that had been previously submitted and take a look at the original package that had been submitted by the bank.

We were contacted by the OFCCP on Thursday, June 25, 1981, when Ms. Hearne called to indicate that Mr. Gladden, after reviewing the case, had determined the original show cause had been erroneously issued. They later determined that we had "shown good cause" and that the San Francisco region was willing to rescind it. A meeting was set for July 7 to negotiate a letter of commitment closing the review.

This whole process has now consumed over 18 months, almost 3,500 man-hours, and cost Bank of the West in excess of $83,000.

The bottom line is that the bank's basic affirmative action efforts have remained unchanged and there have been no additional employment opportunities created as a result of this exercise. There was never even a suggestion of discrimination on the part of the bank, no one has really benefited from this review in the least, it has cost the bank a great deal of money, and I trust the Government has spent an inordinate amount of time and money on one review that focused only on technical minutae while it seemed to overlook the basic concept and purpose of an affirmative action program: to provide employment opportunities for protected class members.

Thank you very much.

Senator QUAYLE (acting chairman). Thank you very much, Mr. Glenn.

BEST COPY AVAILABLE

TESTIMONY OF

STEPHEN C. GLENN, SENIOR VICE PRESIDENT

BANK OF THE WEST - SAN JOSE, CALIFORNIA

BEFORE THE

UNITED STATES SENATE COMMITTEE ON

LABOR AND HUMAN RESOURCES

HEARINGS ON

OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

WASHINGTON, D.C.

JULY 29, 1981

BEST COPY AVAILABLE

Good morning (afternoon). My name is Stephen Glenn. I wish to thank you for this opportunity to speak with you on the subject of the Office of Federal Contract Compliance Programs, specifically the compliance review that has just been completed at Bank of the West.

By way of introduction, I am a Senior Vice President of Bank of the West and am speaking as a representative of this bank. My responsibilities include those of Director of Human Resources and Corporate Planning. Bank of the West is a State chartered commercial bank with offices ranging from San Francisco, our corporate headquarters, to Newport Beach. The majority of our branches are located within Santa Clara County, in and around San Jose, California. Our bank employs approximately 1,150 people.

I would like to stress at this point that Bank of the West fully supports the concept of Affirmative Action and providing equal employment opportunities for all protected class members. This commitment runs from the top of the bank down through all levels of management. Each manager at Bank of the West is evaluated as part of his or her performance appraisal on the results of his or her Affirmative Action efforts, and the results of those efforts show in the statistics and progress of the protected class members of the bank.

In the period from 1975 through to 1980 the results of these efforts clearly show in the statistics. For example, total minority employment at the bank rose 64% during that period from 15.3% to 25.1% This compares with an available labor force in our market area of

20.6% minorities based on California Employment Development Department statistics for Affirmative Action programs. Minorities in officials' and managers' jobs during that same period of time increased 155% from 6.5% to 16.6%. This compares with an approximate available labor force based on EDD statistics of 14.5%.

During that same period women in the bank also have fared very well. The number of women in officials' and managers' positions increased 57% from 28.8% to 45.3%. This compares with an available labor force of approximately 36.9% based on May 1980 EDD statistics

The OFCCP throughout the review of Bank of the West has never focused on the real results of the programs that have been in place in our bank for several years. This causes us some significant concerns regarding the regulations that have been promulgated to interpret and enforce Executive Order 11246, the manner of their enforcement and the impact that they are having on the banking industry, and specifically our institution.

A compliance review was initiated at our bank by the San Jose office of the OFCCP on December 17, 1979. That compliance review was closed July 7, 1981 (subject to acceptance of our letter of commitment). The bank had spent through June 16, 1981, a total of 3,498 man hours on this review, with a total cost of labor, computer time and programming, legal and consultant fees, and Xeroxing expenses directly related to this review in excess of $83,350.[1] Throughout this process, the OFCCP has been unable to find any significant deficiencies of any

[1]See Exhibit I - Cost Breakdown

BEST COPY AVAILABLE

kind in the last. There was never a question of an affected class, discrimination, underutilization or lack of progress toward goals and timetables. We were even told by OFCCP[2] that the bank had an excellent reputation with minority agencies and community groups for working with them.

What I would like to do for the Committee is read William Gladden, Assistant Regional Administrator's letter closing the review, and to recount some of the events that have occurred in the course of this review which have generated a significant level of frustration on the part of management of the bank, resulted in incurring significant expenses on the part of both the bank and the agency, and have provided no meaningful or tangible results of any kind.

First of all, Mr. Gladden's letter which is attached to my testimony as Exhibit II, is the final result of the review of our bank. (See Exhibit II.) The bank's letter of commitment is attached as Exhibit III. Historically, this is how the review proceeded.

On December 18, 1979, we received the OFCCP's standard letter requesting the desk audit information data, with the data to be provided to the OFCCP before or no later than January 17, 1980. We asked for and received an extension of one week from the date that the material was requested.

The bank routinely prepared the data requested in the desk audit letter and then had that information reviewed by the bank's legal counsel, the firm of Jackson, Lewis, Schnitzler & Krupman, who specialize in labor and EEO law. We were advised by legal counsel that our package of requested data was in compliance with the OFCCP regulations. The bank then on January 18, 1980, attempted to submit the requested desk audit information. When the information was delivered to the OFCCP offices, the agency refused to accept the data and called us to request that we not submit it at that time. The rationale for their refusal appears to have been a 60-day time frame under which regulations state they were required to complete the review. They indicated they had not planned to start the review prior to January 25, 1980, and asked us to resubmit the data on that date.

I point this out because I feel that the time pressures the agency is under to complete the review may have impacted the decision that was later made to issue a show cause letter to the bank.

We then resubmitted the package of information on January 25, 1980, as requested by the OFCCP. On February 6, 1980, we received a phone call from the person who had been assigned to the bank review, Mr. Angel Luevano, who asked us to set up a meeting to discuss and clarify some of the desk audit information. He indicated that he had some concerns as to whether or not the desk audit submission was reasonable. The bank scheduled a meeting for February 8, 1980, with Mr. Luevano, the bank's attorney Mr. Cronin, myself, and Mrs. Lois Larson, the bank's Affirmative Action officer. This meeting lasted approximately two hours.

---

[2]Conversation with EOS Luevano, 10:45 A.M., 4/30/81, telephone conversation with area office director Cordova, 5/18/81, 9:30 A.M.

At this initial meeting we explained the computerized format of our AAP in detail, and discussed the organizational structure of our bank. Mr. Luevano discussed the possibility of issuing a show cause letter, and stated that this would also eliminate the 60-day time clock problem. We reviewed the plan in detail, with our attorney outlining how it complied with the regulations. Mr. Luevano indicated he had some concerns about the appropriateness of the bank's job groupings, but conceded that he had never reviewed a bank, and was unfamiliar with the jobs, their content, and the industry. At the conclusion of the meeting we had the impression that we had answered his questions and that it would not be necessary for the agency to issue a show cause letter.

The next contact from the OFCCP was receipt of a show cause letter on February 20, 1980. Five working days had elapsed since our meeting with Mr. Luevano and February 18, the date the letter was sent.

I noted the amount of time that was spent with the bank in discussing these issues, and the amount of time elapsed, because in a later OFCCP communication[3] and conferences[4], they stressed the extensive amount of time spent in negotiating with the bank prior to the issuance of a show cause letter.

This show cause letter erroneously described the bank's work force analysis and job grouping, and stated that it was unacceptable.

The bank met with Luevano and his supervisor Mr. Orozr on February 22 (2 days after receipt of the letter) and explained the same information we had covered in our meeting on February 8, 1980. We explained that the OFCCP had erroneously described what we had submitted, which they conceded.

On March 27, we received a letter from Mr. Luevano stating that the OFCCP had completed the desk audit and was coming onsite to complete the review. (Exhibit IV.) The letter included a request for a substantial amount of information within 10 days (which allowed only 7 working days). It should be noted here that the bank was consistently required to incur significant overtime expense and work staff weekends to meet the unreasonable time frame deadlines imposed on it by the OFCCP.

Throughout this review the OFCCP utilized its power to request information and reports as a vehicle to harass the bank. A listing of the information and reports the bank supplied the agency is included as Exhibit V. The agency was well aware of this tactic. In a meeting on March 31, 1980, the first day of the onsite, Mr. Luevano told me they had several discussions in their office before coming onsite and were pressuring to see how much information they could collect from the bank.

There were many other examples of this technique during the next

[3]Cordova's April 22, 1981, letter to McKenzie Moss, page 2, paragraph 4.

[4]Meeting, 3:00 to 4:30 P.M., 5/26/81, with Cordova, Luevano, Orozr, Moss, Glenn, Cronin, Bank of the West Board Room, San Jose, California

three weeks while the OFCCP was onsite. For example, on April 22, 1980, in a me with Mr. Luevano when we asked why the review at Bank of the West was taking so much longer, and was requiring us to generate so much more information than any other bank in the State, he told us the following. He stated that he had not found any serious problems, that he was just very thorough in his approach. He said that he had reviewed the work done at Crocker, Wells Fargo and Bank of America by the San Francisco office, and while he did not like to talk down his own agency, these reviews were performed in an inadequate fashion and would have been unacceptable to him or the San Jose office. He went on to state, rather proudly, that he had earned a reputation in his previous reviews as being difficult to deal with and taking an adversarial approach toward the contractors he was reviewing. He said he didn't know why this was so, perhaps it was just his nature.

He stated further that if he really wanted to be difficult he could ask us for information going back to 1972 or even 1968, but that he didn't intend to in our case as we were cooperative. He also explained that he was a law school graduate, and though he wasn't an attorney he had a good deal of the Title VII litigation experience from his previous employment. His message was clear - if we objected to his tactics he could make it more difficult and expensive for us.

During the three weeks of this first onsite we were required to spend hundreds of man hours reproducing manually information that was computerized, and completing statistical analysis that should have been done by the OFCCP staff.

On the final day of this first onsite (4.24/80) we were advised by the EOS (Luevano) that he had found no serious problems. He went on to say that he would have a meeting that afternoon with his superiors to discuss the Bank of the West review and determine the agency's course of action. At 4.00 P.M. that afternoon I received a phone call from Mr. Luevano who indicated that he had some bad news: the OFCCP had decided to amend the original show cause and found the bank's Affirmative Action program unacceptable and unreasonable. This decision, he said, was based on our job groupings. He stated that he was working on drafting the amendments to the show cause letter and we would receive them within two weeks (the bank never has received an amended show cause notice).

Our next contact from the OFCCP came 11 weeks later on July 9 when we received a letter from William Gladden, Assistant Regional Administrator in San Francisco. His letter (Exhibit VI) stated that our AAP was too seriously deficient to conduct a desk audit, and they were ready to pursue enforcement. This was despite the fact that they had previously advised us in writing that they had completed the desk audit and they completed an onsite review. (See Exhibit IV.)

At the conciliation conference held on July 30, 1980, the bank and our attorneys met with Mr. James Southard, Chief of Operations for the regional office, Mr. James Chen, also from the San Francisco regional office, and Mr. Luevano. The meeting focused on the bank's job groupings. The bank pointed out that the definition of job groups

AVAILABLE

in the regulations was in parenthesis and required that jobs of similar content, compensation and opportunity be grouped together (Exhibit VII) We argued to no avail that our present grouping met this test. We also cited several banks and savings and loans that this region had recently reviewed and approved with the same job grouping as Bank of the West (We reviewed Xeroxed copies of the Plans with the agency)

We noted that the OFCCP had approved this format in the widely published Chase Manhattan Conciliation Agreement[5] We provided copies of the proposed regulations for the banking industry that OFCCP had published at the time our bank developed its AAP calling for the same format we provided (these were later withdrawn) (Exhibit VIII) We also provided a copy of the agency's Policy Issuance ARA 78-17/60-1 directed specifically at contractors with previously approved automated reporting formats. (Exhibit IX) We were advised that all of these facts were not relevant to our case (We were later told by Mr Luevano on April 30, 1981, that at this time the region had 29 other approved plans with our salary grade based types of job grouping.)

We asked OFCCP if we changed our format and reprogrammed the computer would it be acceptable for our next review. We were told by Mr. Southard that if we changed our job groups this time there could be no assurance that they would be approved in future reviews Mr Chen reviewed our utilization analysis and commented that with 900 people the bank showed a very small number of underutilized job groups, therefore if we are that much in compliance, our job groupings must be inappropriate After threats of enforcement action, the bank conceded to amend its job groups, and revert from an automated program to a manual one for monitoring progress. We were given 5 days to revise our job groups and submitted a proposed grouping on August 5, 1980.

We advised the agency that we would provide a revised AAP within 30 days of approval of our job groups. When we had heard nothing by September 8, 1980, I wrote Mr. Southard to determine our next course of action (Exhibit X) and offered to submit a revised program at their convenience. I received a response from Mr. Cordova of the San Jose office on September 15, 1980, stating that they could not give prior approval to job groups and that our revised AAP was late. We hand delivered it the same day. That was the last we heard from the San Jose office until March 9, 1981, when we received a phone call from Mr. Luevano Six months had elapsed.

During that period I contacted Rachel McKinnon of the San Francisco regional staff twice to inquire of the status of our review. She advised me on December 2, 1980, that she would contact Mr Luevano and have him report back to me Mr. Luevano told me on April 27, 1981, that she did contact him and ask him to call me, but that his superiors told him not to. I only mention this because I feel it's another indication of the agency's attitude throughout the review.

We received a letter from Mr Cordova on March 24, 1981, advising

---

[5]Page 6, Chase Manhattan Conciliation Agreement with OFCCP

AVAILABLE

of another onsite review and requesting voluminous information, while allowing only 9 working days to complete it (Exhibit XI)

Another onsite review was initiated April 27, 1981, and concluded in one week. Again, the agency was unable to identify any significant problems.

We were then presented with a draft of a conciliation agreement and were told that we could conclude the review by signing it. It covered the areas impacted by the revised job groups. (Exhibit XII) Mr. Luevano also conceded that the 18 months spent on the review had had no real bottom line impact on the bank's Affirmative Action posture.

On May 14, 1981, the bank responded to the San Jose office with a letter of commitment that addressed all of the issues in the conciliation agreement. (Exhibit XIII) (It should be noted that all of these changes had already been implemented.) This was accompanied by a legal opinion citing its appropriateness prepared by bank counsel and delivered to Mr. Oroz and Mr. Luevano. They indicated surprise at the bank's response.

I received a phone call from Mr. Cordova on May 18, 1981, who indicated that he was surprised that the bank wouldn't sign the conciliation agreement. He questioned why we wanted to challenge their (OFCCP's) procedures. He said he would not accept a letter of commitment and would move to enforcement. He indicated that if the bank did not sign the conciliation agreement it could cost us another $74,000 and stretch out another year and a half, possibly 3 years.

He stated that he was having his staff re-analyze our data "to make sure they had not overlooked any problems". He said they would do a "thorough" offsite analysis to attempt to detect additional deficiencies in the bank's AAP. He also noted this would not be necessary if we signed the conciliation agreement.

He compared our review to the Firestone case, one he had initiated in Texas. He said while OFCCP had lost the case, he personally viewed it as a victory as it helped clarify the rules. He also noted it took several years and cost a great deal of money. He then requested a meeting with McKenzie Moss, the bank's President, to make certain he understood the implications of not signing the conciliation agreement.

On May 26, 1981, a meeting was held at the bank with Messrs. Moss, Cordova, Oroz, Luevano, Cronin (bank's attorney) and myself. Mr. Cordova reviewed the case and consequences of not signing the conciliation agreement. Mr. Moss noted that his presentation appeared to be a threat, and the discussion became somewhat heated. During the discussion, when asked about some specifics in the bank's letter of commitment, Mr. Cordova said that he had not personally read it (it was addressed to him), that it was still being processed by his staff (Oroz and Luevano). He also said that he had not personally reviewed the bank's AAP.

Mr. Cordova stated that the matter was now out of his hands, that we could talk to Mr. Gladden (Assistant Regional Administrator) if we wished.

BEST COPY AVAILABLE

I telephoned Mr. Gladden's office that afternoon to set up a meeting, and again the following day. Neither call was returned. A meeting was eventually set up through Mrs. Sanchez of Congressman Norman Mineta's staff. It took place on June 16, 1981.

The meeting of June 16, 1981, took place in Mr. Gladden's office in San Francisco. In attendance at that meeting from the bank were Mr. Edouard Finot, Chairman, McKenzie Moss, President, Lois Larson, Asst. Vice President and Affirmative Action Officer, Frank Cronin, bank counsel, and myself. Mr. Gladden was present as was Ms. Lucille Hearne, a member of the OFCCP staff.

During the meeting we reiterated the concerns that we had as to the manner in which the bank's compliance review had been conducted and the tactics that were being used by the San Jose office in their review of Bank of the West. Mr. Gladden, during this meeting, indicated that from the file he had on the bank he was unable to determine if an onsite review had even been conducted. He said that he had been briefed on the bank's review by Mr. Luevano and had instructed him to go back and to amend the show cause letter identifying some substantive issues as nothing in the case presented thus far was of any substance. We requested that Mr. Gladden carefully review the material that had been previously submitted and take a look at the original package that had been submitted by the bank.

We were contacted by the OFCCP on Thursday, June 25, 1981, when Ms. Hearne called to indicate that Mr. Gladden, after reviewing the case, had determined that the original show cause letter had been erroneously issued. They later determined that we had "shown good cause", and that the San Francisco region was willing to rescind it. A meeting was set for July 7 to negotiate a letter of commitment closing the review.

This whole process has now consumed over 18 months, almost 3,500 man hours, and cost Bank of the West $83,350. The bottom line is that the bank's basic Affirmative Action efforts have remained unchanged, there have been no additional employment opportunities created as a result of this exercise, there have been no findings of discrimination on the part of the bank, no one has really benefited from this review in the least. It has cost the bank a great deal of money and I trust that the Government has spent an inordinate amount of money and time on one review that focused only on technical minutiae while it seemed to overlook the basic concept and purpose of an Affirmative Action program - to provide employment opportunities for protected class members.

Thank you very much for allowing us to share with you some of the recent frustrations that we have experienced as a result of our compliance review.

[Note: In the interest of economy, the exhibits supplied for the record by Mr. Glenn were retained in the files of the committee where they will be available for research upon request.]

Mr. EDWARDS. If there are no further questions, Mr. Seymour, Mr. Robinson, we thank you very much.

Our next witness is Mr. George P. Sape, vice president of Organization Resources Counselors, Inc. Organization Resources Counselors is based in New York City, and advises Fortune 250 companies on affirmative action and equal employment opportunity matters.

Mr. Sape, welcome. Without objection your full statement will be made a part of the record, and you may proceed.

TESTIMONY OF GEORGE P. SAPE, VICE PRESIDENT, ORGANIZATION RESOURCES COUNSELORS, INC.

Mr. SAPE. Thank you Mr. Chairman, members of the committee.

Let me just apologize about the lateness of that statement. It was still on a plane when I got off in Baltimore since they wouldn't let us land in Washington. I exercise my vocal rights in my testimony, and baggage could not speak for itself, so I had to wait for it to arrive, which I think it will, some time this morning. I do——

[Pause for interruption.]

It just did. I do apologize for that inconvenience to the committee.

Now, let me suggest that my role perhaps is a little unique here today in terms of helping the committee gain some additional perspective on this topic. We are, as you may know, a consulting firm. We are worldwide. We specialize in the area of employee relationships, and only that. We do not engage in any other form of business.

Our clients, again anticipating some of the comments that I heard from members of the panel, our clients do tend to be large corporations, so my perspective will be stilted in that direction, and will reflect more of the views of large corporations in some of the things that they are doing.

Nevertheless, we do cover, with our work in equal employment opportunity, about 220 of the major corporations in the United States, and from that perspective, I think, I can add something to the committee's understanding of how the contract compliance and Federal contractor effort is viewed.

First of all, I would say that, perhaps the most important thing to understand in today's major corporation is the tremendous rate of change that the issue of equal employment opportunity has experienced. It is clearly an issue that has taken on various new forms and new directions, some of them clearly without Government role and without Government pressure.

We did a major survey 1 year ago where we spent quite a bit of time with all of our companies exploring the nature of their EEO programs. I will offer copies of that survey and its report to the committee, not for inclusion in the record, unless you so feel, but purely for background information on what some of the companies answers in various areas—but there are a couple of things from that study which I thought I would point out to you today, and it points out a little bit of the dichotomy about the approach-avoidance that companies have with the Government.

Virtually unanimously, companies say that they do not want more Government activity, more Government interference with re-

spect to their employee relations programs, and that they have been moving away from reliance upon the Government. And yet, when we ask the question of the major corporations, the 189 corporations who participated in this study, in terms of external influences on employee relations, what exerted the greatest influence in, first, 1979, and then in 1983.

In 1979, virtually all companies said that it was Federal contract compliance.

In 1983, interestingly, Federal contract compliance had dropped to the second most important influence. Litigation had become the single most important influence in terms of employee relations. And this goes beyond EEO issues, I should stress, in terms of litigation.

We also asked how strongly the issue of contract compliance shapes corporate equal employment programs; 24 percent said significantly, and 44 percent said moderately. Incidentally, there is a small chart on page 6 of my testimony which has all this data set out.

Interestingly enough, 24.5 percent said Federal contract compliance has very little influence on corporate programs in EEO. I suspect that, if we had asked that question 5 years ago, we wouldn't have seen that high a number.

We also asked that if, in fact, contract compliance were to be lessened as a Government program, what would be the driving element that would replace it in terms of motivating the corporate EEO efforts, and 46 percent of the companies responded that it would be the fear of litigation.

So, no matter how we look at it, the role of the outside world, whether it is the Government or the courts, continues to be a very dominant factor in this whole area of equal employment opportunity.

I wanted to say that at the outset just to put some things in perspective in terms of how the companies view themselves.

Balancing against those figures that I just gave is a very definite view by companies that the Government's efforts in EEO, particularly the Government's efforts under the OFCCP to date, have been not terribly helpful in many respects. They have been extraordinarily rigid, they have oftentimes overlooked the realities of corporate life in favor of adherence to strict rules and regulations, and have oftentimes asked companies to engage in programs which, in fact, the managers of the EEO programs that I work with have felt were counterproductive.

So, we've had a series of ongoing debates with the Government over the period of time that suggest that perhaps some changes are very much in order.

When this administration came into office, I think companies were looking—at least the companies that I feel that I can reflect their programs a little bit—were looking for a little bit of breathing space. So it was viewed that, perhaps, the period of regulatory relief that was announced right at the beginning of this administration would signal a change in governmental efforts, and we would be able to put some things in perhaps little more streamlined perspective, and companies would have a change to realign some of their programs with a little bit more—more directly.

However, I must confess that there is a considerable amount of—confusion would be a good way to put it, and disappointment would perhaps be a more accurate way to put it—in what the administration has failed to clarify in this area of contract compliance and affirmative action.

First of all, while the administration did suspend the so-called Carter rules and regulations relating to OFCCP, to this day it has not substituted new rules and regulations. So, rather than having on paper less to do, we really have more to do than we did at the beginning of this administration, because the rules that are currently in effect are an old set of rules that have all of the paperwork burden, all the restraints and restrictions that, I think, everybody admits are not necessary. The Labor Department did, in the first term, issue new proposed rules. I think a lot of companies were very positively inclined toward those rules. They submitted a lot of comments. And then again nothing happened.

The rules, we subsequently learned, had been suspended by the administration again, and the proposed rules, without ever being issued. So this period of uncertainty and confusion continues, companies, in the meantime, having to find their way through the area of OFCCP and contract compliance as best they could.

And then recently we have all confronted, as I know this committee has confronted, a series of rumors and leaked documents about proposed changes to the Executive order, with frankly no discussion with the contractor community as to what those changes would do to existing programs. In fact, contractors, major corporations as well as small businesses, as far as I know, have never been formally contacted by anyone in the administration on what their views are on some of the proposed changes that might be forthcoming from the administration.

It was in part this uncertainty, and the failure of the administration to contact its own clientele in this are a of contract compliance, which prompted ORC to survey the chief executive officers, of which your first witness today happens to be one, who are our client companies, and ask them a series of questions about the role of numerical measures, and goals, and timetables, in their own corporation. And the complete survey, as well as the responses, are the very last item on the written statement that I have submitted.

You can see for yourselves that, out of 142 responses that we got to the question that said, "if the Government withdraws its current requirements for numerical measures, how many of you would plan to continue them in your companies?" Of these responding, 95.3 percent said that they would continue, and, in fact, our subsequent discussions with some of the chief executive officers, some of the letters we received, and discussions with staff, posed an interesting quandary—why the Government would even consider the removal of goals and timetables when there were so many other things in the rules and regulations and the administration of contract compliance which were viewed as much more important, and, in fact, much more onerous.

For a large company in particular, there is virtually no other way to set company policy and to manage that policy than to use some form of numerical measure. When you are dealing with a large, complex organization, you don't manage by good feel, you

manage by bottom line results, and those results are inevitably measured, whether it be in production or in human resources, or in marketing, or in advertising.

Companies feel, based on the conversations that we have had, and the results of our survey, that if the Government were to abandon numbers altogether, it would weaken their ability to continue to use numbers internally, even though they all feel they must. Companies are concerned that if the Government has no numerical requirements under its contract compliance rules and regulations, that their own use of numbers will be used against them, that employees who feel, for one reason or another, that they have been mistreated or maligned by supervisors, or that the operations of affirmative action have somehow worked to their negative, they would be using the numbers to prove their case.

In turn, the company, which might be weakened in terms of the kind of numbers which it used, would not be able to defend itself as well, since we all recognize that in litigation and enforcement of EEO, we do go back to looking at how many people do we have, in what jobs, and how they got there, and how long they've been there.

So, there is, I think, a considerable amount of discouraged, perhaps—discouragement—or opposition might be too strong—to the proposals that we have seen, that would suggest that you need to amend the Executive order first, and you need to amend the Executive order to remove the existence of goals and timetables.

We have heard one of the reasons given for that: that goals and timetables are, in fact, another way of saying that one uses quotas. And, while I'm sure that there are experiences to the contrary, I can tell you in all candor that, in the 10 years that I have worked with corporations in this field at ORC, and in the time or in various capacities in the Government, I have never seen goals and timetables used as a quota. They are used as indicators, they are used as measures. If you are a manager, you are told "this is what your objective is." Among qualified people, you should seek to increase the participation of either minorities or women in certain job categories, depending on what that category and what that need is.

I do not believe that, at least in any of the companies that I am familiar with, affirmative actions plans and goals and timetables have ever been used to force either the hiring or the promotion of less qualified people. I simply have had no experience that would bear that out. I have read court cases, as we all have, of instances where that has happened, and I am sure that there are instances of any kind that one can find, but I would say that the mainstream corporate community would not in any way engage in rigid quotas or in hiring the less qualified. It works against their selves.

Finally, I would not want to conclude by somehow suggesting that we support the existing contract compliance program and its efforts. I think there are many things that the Government should have done by now, and certainly should be urged to do quickly, to provide relief to both small and large Federal contractors. Abandonment of the program is not one of them.

We feel, for example, as I'm sure members of the panel do, that the rules and regulations need to be significantly simplified, and

much of Revised Order No. 4 needs to be rethought and perhaps abandoned.

However, we do feel that goals and timetables should be retained. Their application, perhaps, should be made more flexible, and they should be directed more toward a measurement of change, rather than absolute numbers in and of themselves, that the Government can use on an annual basis.

We also feel very strongly that title VII standards should be made a part of contract compliance. At the present time there is some confusion about that, but we feel that, if there is confusion about standards of discrimination under contract compliance, that confusion can be quickly modified and clarified by simply saying that title VII standards shall control. That would address the question of preferential treatment, since that is already covered by title VII, and it would address the very touchy issue of affected class. That also is covered by title VII.

And, finally, we do feel that the Government should affirm its intent in contract compliance as a forward-looking and positive remedy, rather than seeking from time to time, as it has, to invoke the backpay remedy as part of a contract compliance process, which really we view as more of a management role, rather than a punitive role.

Mr. Chairman, I would be happy to answer any questions that you may have.

Mr. EDWARDS. Thank you very much, Mr. Sape, for the really very helpful testimony. You are a distinguished expert, and we appreciate it very much.

[The statement of Mr. Sape follows:]

BEST COPY AVAILABLE

Testimony of George P. Sape, Vice President, Organization Resources Counselors, Inc.

Mr. Chairman, members of the Subcommittee, my name is George P. Sape. I am Vice President of Organization Resources Counselors, Inc. (ORC). ORC is a world-wide management consulting firm which specializes in the area of employment practices and the utilization of human resources. Our work requires that we assist employers, both public and private, to design, review, and improve the systems and procedures which they use to manage their employment processes, and to assist them in solving problems affecting portions of their personnel management procedures. Our work, therefore, touches upon all the various areas of personnel management, and ranges from a review and assessment of the effectiveness of a corporate organization and structure in the management of people, to the evaluation of specific management personnel practices. We also strive to be sensitive to new trends and concepts in personnel management, and to be responsive to the most effective implementation of programs required by government and regulatory demands.

To this end, we work with management in various areas such as domestic and international compensation, occupational safety and health, labor-management relationships, employee attitudes and productivity, and training and development. Our clients tend to be predominantly large corporate organizations, or agencies of either federal, state, and local governments.

One major area of our consultative work involves equal employment opportunity. In this area, we provide consulting services to 210 of the nation's major employers who are representative of every major segment of American business and all areas of the country. Therefore, ORC has wide-ranging experience in the effectiveness of EEO programs in the private sector and a broadly based perspective on the effects of various EEO programs.

We gain our perspective and expertise through a continuous interaction with our client companies, both on specific assignments with individual companies and through an on-going ORC activity called the Equal Opportunity Group (EOG). The EOG is a unique process, managed by ORC, which allows corporate representatives having responsibility for the design and implementation of EEO programs within their respective companies to meet regularly during the year, and to maintain a regular contact with others having similar corporate responsibilities. Meetings of the EOG are conducted in a series of nine separate round-table sessions. Each session is designed to discuss current developments and requirements in the equal employment area, to exchange information on current issues and concerns, to examine the impact of various governmental and judicial initiatives, and to evaluate the gains and problems experienced by employers in attaining their equal employment objectives.

BEST COPY AVAILABLE

This continual and regular contact with such a large number of major corporate organizations provides us with a good cross-section of the successes and failures that businesses experience in grappling with the multitude of problems encountered in implementing equal employment programs. Also, because the EOG has been in existence since 1967, it provides us with a good historical and evolutionary perspective on EEO progress among major U.S. employers, and a good sense of the future needs of EEO as part of a broader set of corporate management initiatives.

It is within this framework that we are pleased to present our testimony to the Subcommittee today. Because of our experience with the implementation of various EEO efforts among major employers, our perspective on the attainment of EEO objectives tends to be practical rather than ideological or doctrinaire, and we would be the first to acknowledge that among major corporate organizations, there exist wide variations in what is viewed as necessary in the attainment of effective equal employment results. I should also stress that we do not speak for any one industry or industry group, and that our views are a reflection of our experience in equal employment programs. Further, they should not be construed as reflective of any single employer. It is fair, however, to characterize the position of our views as more reflective of large rather than small employers.

COPY AVAILABLE

I understand that the Committee's primary interest in these hearings is to examine the effectiveness of affirmative action programs in the private sector, and to relate their role to current federal contract compliance requirements of E.O. 11246. Because almost all of the 210 corporate organizations affiliated with the EOG are also federal contractors, we have had a wide-ranging and extensive experience with contract compliance. My views, as presented to the Committee today, are based on this experience and reflect, in part, the varied experiences that companies have had with the contract compliance program over the past several years.

In presenting our views, however, I would stress to the Committee that adherence to contract compliance requirements is only a small part of the total responsibilities that constitute EEO in today's business organization. Therefore, while the Committee focuses its attention on the effectiveness of affirmative action programs, I hope that it will not lose sight of the fact that implementation of affirmative action in today's corporate environment goes far beyond the elements of federal contract compliance programs. Equal employment programs in today's corporate environment involve a series of complex and often subtle concerns which focus on such diverse needs as the rapidly changing skill requirements in today's technological environment, declining opportunities for advancement in shrinking corporate organizations, an aging

BEST COPY AVAILABLE

workforce, and the impact of technology on jobs. All of these issues are, in turn, tied to various affirmative action efforts, though little of such efforts may actually be reflected in a formal affirmative action plan submitted to the government in compliance with E.O. 11246.

By necessity, in today's rapidly changing business climate, much of the focus of large business organizations in the attainment of equal employment objectives goes beyond the traditional sense of EEO practices as reflected in various government programs. This is not to suggest, however, that government programs do not play any important continuing role in the formulation and management of company EEO programs. Last year, ORC conducted a major survey of the equal employment practices of the companies represented in the EOG. The purpose of the study was to identify the major elements which shape company equal employment programs, both now and in the near term future. I have provided a copy of that study to the Subcommittee staff for the Committee's use, as appropriate.

The study, which reflects the equal employment programs of 189 major companies which participated in it, focused part of its research on the influences which most directly impacted on the management of EEO within each company. One set of questions asked companies to indicate what areas of EEO activity required the greatest amount of resources to implement. These questions asked

BEST COPY AVAILABLE

for an indication of the resources allocated first in 1979 and again in 1983. The responses indicated that in 1979, the issue which required the greatest amount of company EEO resources was contract compliance. In 1983, the same companies indicated that contract compliance was still very much an issue to which they assigned resources, but that it had become second to charges of discrimination arising under Title VII and the ADEA, and the potential litigation that these charges represented.

In our study, we also asked companies to describe the impact of various external influences on the management of the equal employment programs, both as to the present and what they anticipated would be the forces shaping equal employment in 1988. Part of our inquiry focused specifically on the role of contract compliance demands and how much these demands shape company EEO programs. The responses are significant, as reflected in the table below:

EXTENT TO WHICH CONTRACT COMPLIANCE
SHAPES COMPANY EEO PROGRAMS

Extent	Responses	
	Number	Percent
Not at all	12	6.4%
Very little	46	24.5
Moderately	84	44.6
Significantly	46	24.5

BEST COPY AVAILABLE

Based on these results, it is obvious that contract compliance continues to exert a significant influence on the management of EEO programs among major employers. One fourth of the companies which responded to this issue indicated that contract compliance significantly influences the company EEO program. Of equal significance, however, is the result which shows that for almost one-third of the companies represented in the EOG, contract compliance either has very little influence on the company's EEO program or represents only a small factor in the total administration of EEO efforts.

Equally important, in our view was the response to the question which asked what external influences companies felt would most impact on their EEO programs in the next five years, assuming that government implementation of contract compliance would be relaxed. The largest number of companies responded that fear of litigation would constitute the major external source of pressure to continue equal employment efforts. The results on this issue are set out in the table below:

NONCONTRACT-COMPLIANCE SOURCES
OF FUTURE EXTERNAL PRESSURE

Source	Responses	
	Number	Percent
1. Fear of Litigation	83	46.1
2. Desire to Avoid Unionization	15	8.3
3. Third-Party Pressure Groups	21	11.7
4. State/Local Government Enforcement	27	15.0
5. Other*	34	18.9
Total	180	100.0%
* • Fear of Litigation/		
--third-party pressure	5	2.8%
--union avoidance	3	1.7
--state and local government	4	2.2
• Labor force demographics	11	6.1
• Publicity/competitive concerns	5	2.8
• Various	6	3.3
	34	18.9%

Based on the data shown above, however, I do not want the Committee to draw the conclusion that companies rely on contract compliance regulations or other government requirements to manage their EEO programs. The date which I have cited to the Committee is only one element of a much broader and more complex set of

issues and factors which were included in our study. The predominant focus of our study was upon the internal forces which are influencing the course of EEO management in major organizations. While we found that many company programs are still heavily influenced by the existence of government programs, most companies have, in fact, begun to move beyond external compliance issues in the shaping of their EEO programs.

Most large companies maintain EEO programs where the role of affirmative action goes far beyond that which is required by the Affirmative Action Plans (AAP) encompassed within the requirements flowing out of E.O. 11246. In fact, in many companies, the AAP required by the Labor Department's Office of Federal Contract Compliance Programs (OFCCP) is viewed as an outdated mechanism which generally does not reflect the current state of EEO and human resource management within the company.

The rigidity and complexity of OFCCP regulations have long since been supplanted in many companies by more streamlined and focused management objectives where EEO progress is measured by internal corporate standards which are more specific and often exceed those expected by the OFCCP, and where the responsibility for effective integration of minorities and women into the workforce is assigned to operating manager rather than resting in some remote set of regulatory standards. Accountability for the attainment of EEO

objectives is measured against corporate standards which are consistent with other corporate objectives, and failure to attain such objectives reflects on a manager's success within the company.

Further, EEO consideration have been built into a large number of varied company programs, from compensation, training, and career development to areas such as advertisements, marketing, special aid to educational institutions, and minority participation in providing services to the corporation. All of these efforts are designed to assist the company to formulate, evaluate, implement and monitor corporate EEO objectives in conjunction with other corporate objectives. How well any particular company is doing toward the attainment of its EEO objectives will vary widely, depending upon the size of the company, its product line, its profitability, and whether it is a growing or declining business.

The period of the past few years, with lessened emphasis on government regulatory demands in EEO has, in fact, allowed companies to strengthen their affirmative action programs. While ORC has heard suggestions that the lessened involvement of the government through the contract compliance programs has taken the pressure off of affirmative action, our experience has shown that not to be true. Companies with whom ORC is familiar have used the opportunity of reduced governmental interference to expand company

BEST COPY AVAILABLE

efforts at integration, and have been more willing to try innova_ive and often risky initiatives to enhance the rate of progress of minorities and women within their organization.

This same period has not been without considerable concern in the corporate sector about the future role of EEO. While the period of reduced regularity intrusion has been welcome, the implication has also been raised by some both inside and outside the government that may long-standing EEO practices are unnecessary or perhaps even illegal. The contract compliance program appears to have been singled out for particular attack in this regard. From the very beginning of this Administration, confusing has surrounded the proper role of contract compliance and its affirmative action requirements.

On the eve of taking office, the Administration suspended the pending OFCCP rules and regulations which had been adopted by the previous Administration. While the business community supported that action, since the rules and regulations which had been adopted by the out-going Administration were generally viewed as unrealistic and unnecessarily intrusive into the business environment, the new Administration thereafter failed to clearly state its policy direction on the role of affirmative action.

BEST COPY AVAILABLE

Consideration was given to the total elimination of E.O. 11246, and the establishment of contract compliance in some new form. That position was abandoned in favor of retaining the current Executive Order, but directing the Department of Labor to significantly modify the underlying rules and regulations to eliminate some of their more onerous provisions.

Such proposed rules were issued, after a considerable delay and resulting uncertainty on the part of the business community. When the proposed rules were released, ORC along with a large number of other business organizations submitted what we felt were constructive comments which would have brought the anticipated new rules into line with the reality of EEO management in companies. We and other business groups felt that with a few simple but important changes, government affirmative action requirements could be significantly improved and made more effective.

The Department of Labor never did issue the proposed rules. We learned after almost two years, that there had been a general lack of agreement within the government on what should be included in the final set of rules, and that they were, in fact, withdrawn from consideration. Thus, federal contractors were left to wonder what would be the precise standards by which compliance would be judged and how company affirmative action plans would be evaluated. At the same time rumors continued to surface which

BEST COPY AVAILABLE

suggested various options were being considered, though no statement of the Administration's position was ever issued. Federal contractors, therefore, continued to administer affirmative action plans without any clear sense of what were the standards that would apply to any individual location which might be the subject of governmental review.

Throughout this time period, the press treatment of affirmative action issues suggested that the Administration had set out to weaken the progress in EEO that had been made in previous years. The reports also intimated that the Administration's policies were endorsed by the business community. Such reports have caused considerable concern among many of the companies with whom ORC is familiar. Employees, and lower level managers who may not be fully familiar with all of the requirements included in a company's affirmative action process, began to echo this perception.

Many companies began experiencing a rise of employee complaints about discrimination. More careful examination of many of these complaints revealed that the companies who were the subjects of the complaints were, in fact, not behaving any differently than previously, but that employees, fearing a deterioration of commitment to EEO, were quick to infer discrimination from otherwise normal and nondiscriminatory behavior. This problem has been aggravated by the fact that many of the large companies with

BEST COPY AVAILABLE

sizeable minority and female populations have been reducing the size of their workforce significantly, resulting in major employee dislocations and large-scale reductions in force.

It was in part this uncertainty which stimulated us to undertake the major study of company EEO practices which I have already referenced. It was also the continuing uncertainty about the scope of affirmative action, and the future role of the OFCCP, which resulted in a short survey which we submitted to the Chief Executive Officers of the companies represented in the EOG. The survey, which was conducted during November 1984, was designed to identify corporate affirmative action efforts which relied upon numerical objectives to track the progress of minorities and women. I have attached a copy of the survey questions and results to my remarks for the Committee's use.

Significantly, of 142 responses received from 190 surveys that were sent out, 95.3 percent indicated that the company would continue to use race and sex specific numerical objectives to track the progress of minorities and women within their organization.

Subsequent discussions with many of the companies which participated in the survey resulted in a reaffirmation of the answers to the survey. Many companies seemed surprised that there

BEST COPY AVAILABLE

would be any consideration given to an affirmative action process which did not include specific numbers. As described by several company officials, there is virtually no other way to set company priorities, establish uniformly understood procedures and requirements, and monitor the company's progress toward its goals without the use of specific numerical values.

Other reasons were also presented to us for the continuing need for race and sex specific numerical objectives as part of any affirmative action program. Many companies felt that the abandonment of such numerical data would leave the company in a much weaker position to defend itself in subsequent actions which it might face where its commitment to integration might be a issue. Companies felt that a consistent record of gradual progress at various job levels, as shown by its affirmative action data, would provide the best means by which to defend against such actions, and establish the validity of its good faith efforts.

It is in this context that many of the companies represented in the EOG have been concerned about the recent reports that the Administration would like to amend E.O. 11246 to prohibit the use of goals and timetables under the contract compliance program. Companies with long-standing affirmative action plans have expressed concern that the elimination of all goals and timetables would effectively negate any value that the contract compliance

AVAILABLE

program may have. It would also, in the view of many, raise significant management problems by calling into question numerically-based affirmative action plans already in place, eliminate the national standard which companies can use to defend against the imposition of various and inconsistent state and local requirements, and remove uniform and neutral standards by which affirmative action programs can be judged.

Further, many companies are concerned that the rumored amendments to E.O. 11246 have been developed without the opportunity for companies which would be most effected by the proposed changes to comment on their implications. Most of the companies which are members of the EOG feel that the subtleties of affirmative action should be the subject of public rulemaking, so that specific proposals can be evaluated in their full context, and their potential impact examined carefully.

ORC fails to see the benefits that the government would gain from the kinds of proposed amendments that have been surfaced in the press during the last few weeks. We feel that references attributed to the government that goals and timetables applied under E.O. 11246 are tantamount to prohibit racial or sexual quotas is not correct. Affirmative action plans which use specific goals and timetables do not establish rigid quotas for minorities and women. They do, however, put company managers on notice that they are expected, among properly qualified

BEST COPY AVAILABLE

individuals, to strive for increased minority and female participation at various job levels.

ORC is not aware of instances where affirmative action plans are used to enforce the hiring of minorities and women who do no meet the qualifications of a particular job in question. Where a plan does identify that managers have been unable to locate qualified minorities and women for particular positions, it may stimulate other portions of the affirmative action process designed to emphasize training and skills development so that adequate candidates can be developed.

Our position to the proposed amendments to E.O. 11246 should not be read to suggest that we favor all aspects of the existing contract compliance program. Consistent with past positions that ORC and other business groups have taken, we favor extensive revisions to the existing rules and regulations which would bring the elements of contract compliance into conformity with corporate realities in 1980's.

To that extend, we would urge that the Department of Labor issue proposed rules and regulations as quickly as possible, reflecting at least the following concerns:

BEST COPY AVAILABLE

1. OFCCP rules and regulations should be significantly simplified. Much of the current provisions in Revised Order No. 4 should be eliminated or simplified.

2. Goals and timetables should be retained, but their application made more flexible and their use directed toward measurement of change over time rather than as absolute values within a given year.

3. Title VII standards should be made explicitly controlling on all matters affecting the standards of discrimination. This would also include the Title VII prohibition against preferential treatment and on affected class issues.

4. Past practice of seeking back pay for violations of the Executive Order should be eliminated.

RESULTS OF THE ORC EQUAL OPPORTUNITY GROUP AFFIRMATIVE ACTION SURVEY

	Responses	
	Yes	No
1. Does your organization maintain a corporatewide affirmative action program?	126	16
2. Does your affirmative action program contain specific numerical objectives for attainment of desired minority and female participation levels?	131	9
If the answer to question 2 was Yes, please respond to as many of the following questions as apply to your program.		
3. Are numerical objectives for minority and female participation in the work force established to satisfy:		
a. Government regulations?	107	19
b. Corporate objectives unrelated to government regulations?	116	11
4. Do you favor the continuation of corporate numerical objectives to chart the progress of minorities and women?	117	10
5. Do you plan to continue to use numerical objectives to track the progress of women and minorities in your corporation, regardless of government requirements?	122	6

Note: The numbers do not add up to the total responses received because not every company answered each question.

November 1984

Mr. EDWARDS. We will have to recess for about 5 or 6 minutes for a vote in the Chamber of the House, but we will return after the recess.

[Recess.]

Mr. EDWARDS. We certainly apologize. The electronic accounting system was down. It gives you great confidence in star wars.

Mr. SENSENBRENNER. Would the Chairman yield?

That's a ground-base accounting system, like the service has. Ours is a space-base accounting system.

Mr. EDWARDS. I'm glad Mr. Sensenbrenner cleared that up.

Mr. Sensenbrenner, you are recognized for 5 minutes.

Mr. SENSENBRENNER. Well, thank you very much, Mr. Chairman.

I have been very interested in your testimony, and particularly the survey you gave of the large corporations that you work for.

One of the questions says, "Does your Affirmative Action Program contain specific numerical objectives for hiring?" And that was responded by 131 to 9 in the affirmative.

How do you prevent numerical objectives from turning into numerical quotas?

Mr. SAPE. There is probably no foolproof way of doing that, quite frankly. The more remote an individual decisionmaker is from a central authority, the less control you have, and the more likely a person is to do something on their own.

The only was that the large companies do it is by constant monitoring. So, rather than allowing the pressure to build toward the end of the year, for example, on an objective, they monitor during the course of the year, and they meet with the local managers and say, "OK, you're not meeting your objectives as we anticipated during the course of the year, are there any problems, can we help?" And so on, that's about the only way that I can answer that, Congressman, without—those are the only ones I know, just really by careful monitoring and sort of an interaction with the managers.

Mr. SENSENBRENNER. Well, to be honest with you, I think if we are debating the term "numerical objectives," and the term "quotas," we are really dealing with a difference in semantics rather than a difference in results, and your testimony is some of the first that I have heard that has shown that the quota problem has infected big business as well as infecting small business. I think that that shows very clearly that there is need for some change in the Executive order and in the regulations implementing the Executive order.

One final question: How biased do you think your survey was in its responses based upon the feeling as, "well, after all these years we've finally known what the regulations are, and we've paid our legal fees and know what to do, and we just have to start from scratch if they're changed?"

Mr. SAPE. I guess there would have been some of that had we submitted the survey to, let's say, the director of personnel. But there was a deliberate reason to go directly to the chief executive officer, who would have a—more of a policy-oriented approach on that question.

I would say that there is some bias in the answer, of course. How much, I don't know.

Mr. SENSENBRENNER. Wouldn't he, oh, refer this over to the director of personnel, or, at the very least, call the director of personnel in and say, "how should I answer this?"

Mr. SAPE. True, but I can tell you, for example, that a letter I got back from Mr. Iacocca, one of several that I am at liberty—his I know I can talk about, and he said—he wrote back the letter with the survey saying, "you, know, I've discussed this with my people, I've been advised that there are several different ways, and what we plan to do at Chrysler is to continue to use the systems that we've installed because they help us do what we need to do." I mean, I'm paraphrasing, but that was the——

Mr. SENSENBRENNER. Yes, OK.

Now, that finally gets down to the bottom line of the specific proposal. The specific proposal that the administration, the Justice Department has come up with, simply replaces the existing Executive order with the voluntary use of numerical goals and timetables, so long as they don't discriminate.

Now, what's wrong with making them voluntary, if most of the corporations in your survey, a 116 to 11, to be specific, have stated that their procedures are related to corporate objectives unrelated to Government regulations?

Mr. SAPE. The biggest problem that we have had described to us by a large number of the companies is that it creates two things for them.

No. 1, it removes the national standard, as it were, allowing State and local governments, which are already getting into the business of contract compliance, to do so even more rapidly. The problem for a large national corporation is that then, rather than having the one standard of compliance, a bottom line standard of compliance, you then end up having to negotiate with 50, 60, 70, separate standards. And that's a big problem.

Mr. SENSENBRENNER. But where in the Federal regulations has been there a preemption against State and local governments from putting together and enforcing their own regulations?

Mr. SAPE. There has been no official preemption. It's just—basically, companies have been able to interpose their affirmative action results under Executive Order 11246 when dealing with State and local agencies, and those have been accepted most of the time.

Mr. SENSENBRENNER. Well, if there is a new Executive order, can't they interpose the results under the new Executive order with State and local agencies?

Mr. SAPE. As long as there is a numerical measure retained in the Executive order, I think the answer is "yes."

Mr. SENSENBRENNER. Well, your survey indicates that there would be a significant voluntary compliance under the Justice Department's proposed draft. As a matter of fact, there is more support for minority and female hiring as a result of corporate objectives unrelated to Government regulations than as related to Government regulations in your survey. That, to me, seems to be a very strong argument in favor of the voluntary approach that the Justice Department draft embodies.

Mr. SAPE. Oh, I don't think there is any objection in major business to a voluntary approach, as long as the Federal Government

retains some standard against which they can judge their own effectiveness.

Mr. SENSENBRENNER. OK, thank you very much.

Mr. EDWARDS. Well, the thrust of your very excellent testimony is that the concept, general outline and intent of the Federal Government's involvement in affirmative action is approved by a great majority of your clients, but that the administration ought to shape up and reform the implementation, in the paperwork. They've got a lot of things that people have to do that they shouldn't have to do in the execution and compliance, isn't that roughly correct?

Mr. SAPE. In essence, that is very correct, Mr. Chairman. My companies, whose positions I am familiar with, would have consistently maintained that their problem is not with the text of the Executive order, but with the implementing rules and regulations, and in part with the actual procedures applied by the staff of the OFCCP.

You see, we were certainly hopeful that, in that first round of rulemaking in 1981, that we would see major changes. We never did. So——

Mr. EDWARDS. Well, let me suggest to you, and this is something Mr. Sensenbrenner, Mr. DeWine, and I do back home, and that is when we get a complaint about Federal paperwork or Federal intransigence in some agency, we go right to them and say: "Now, look, this is what we hear you're doing."

We would like to hear, in this subcommittee, about some of the problems that contractors face, and we would certainly try to do something about it, because that is very unacceptable practice.

Let's see—Mr. DeWine, did I skip you?

Mr. DEWINE. No questions, Mr. Chairman.

Mr. EDWARDS. Well, thank you very much. We are sorry we kept you waiting.

Mr. SAPE. Thank you.

Mr. SENSENBRENNER. Mr. Chairman, before the next witnesses appear, I would like to ask unanimous consent that a statement by the Associated General Contractors of America on this subject be inserted in the hearing record.

Mr. EDWARDS. Without objection, it is so ordered.

[The statement follows:]

STATEMENT BY

THE ASSOCIATED GENERAL CONTRACTORS OF AMERICA

TO

THE SUBCOMMITTEE ON CIVIL AND CONSTITUTIONAL RIGHTS

OF

THE COMMITTEE ON THE JUDICIARY

OF

THE UNITED STATES HOUSE OF REPRESENTATIVES

ON

EXECUTIVE ORDER 11246

NOVEMBER 7, 1985

AGC is:

- More than 32,000 firms, including 8,400 of America's leading general construction contractors, responsible for the employment of more than 3,400,000 individuals; and
- 110 chapters nationwide.

AGC members complete:

- More than 80% of America's contract construction of commercial buildings, highways, industrial facilities and municipal utilities; and
- More than $100 billion in annual construction volume.

The Associated General Contractors of America (AGC) has more than 32,000 members. Among them are 8,400 of the nation's leading general construction contractors. Responsible for the employment of more than 3,400,000 Americans, AGC's members perform more than 80 percent of all contracts for the construction of commercial buildings, highways, industrial facilities, and municipal utilities.

They also perform much of the federal and federally assisted work that is subject to Executive Order 11246. They have a great deal of first-hand experience with the Executive Order and its implementing regulations. Their experiences lead AGC to support the recent proposals to amend the Executive Order -- first, to eliminate the goals, quotas, ratios and other purely statistical measures of affirmative action, and second, to expand the roles of recruitment and training.

The construction industry remains not only one of the largest but also the most competitive of American industries. The construction industry has no "big three"; rather, it is comprised of hundreds of thousands of small businesses. As a result, construction contractors deeply and fully appreciate the importance of guaranteeing equal opportunity for all Americans. Without an equal opportunity to bid on available work, construction

BEST COPY AVAILABLE

contractors cannot survive.

AGC supports affirmative action, but not programs or policies which require construction contractors to hire and retain fixed numbers of minority and female workers. The only meaningful affirmative action is that which equips minorities and women to compete in the labor market.

When the Labor Department, under the banner of Executive Order 11246, imposed minority and female quotas on the construction industry, the Department not only robbed the Executive Order of its moral authority, but also disregarded the Department's own requirement that statistical measures reflect appropriate data. The Department based its female quota on its entirely irrelevant desire to settle ongoing litigation. The Department based its minority quotas on statistical data, but data which did not consider the number of minorities who are not only qualified for but also interested in each of the construction trades.

The regulations implementing Executive Order 11246 require construction contractors to take sixteen affirmative action steps, expecting that the contractors who take these steps, in good faith, will meet the quotas for minority and female employment. The Department's Compliance Manual, which guides its field personnel, and determines, in practice, what will satisfy such personnel, subdivides the sixteen steps into sixty-four substeps. As if requiring these discrete substeps was not enough in itself, the Department then requires each contractor

AVAILABLE

to document each substep.

The Department has built such complexity and detail into the system that it can find an excuse to cite any construction contractor who fails to meet the Department's statistical expectations, and the Department has shown that it is willing to use the system in that way. The Department's field personnel have demanded that construction contractors sign conciliation agreements for failing to fully document any one of the sixty-four substeps. The Department requires voluminous files of letters, minutes, diaries, memoranda, telephone logs, and the like.

In practice, construction contractors must either meet the Department's statistical expectations or sign conciliation agreements, and/or suffer purely punitive debarments -- leading to the loss of the contractor's livelihood -- because the Department's field personnel perceive the numbers as absolute, inflexible quotas. In the language of several of the conciliation agreements which the Department has demanded, the numbers are "required goals."

During one review of these conciliation agreements, AGC found six instances in which the Department had not even made any effort to hide the fact that its numbers are quotas. The department imposed conciliation agreements on even those contractors with good statistical records.

- One contractor had a minority "goal" of 20.5% to 22%. Field personnel imposed a conciliation agreement on this contractor

BEST COPY AVAILABLE

even though he had achieved minority utilization rates of 19%, 13%, 18% and 16.2% during the four months under review. The conciliation agreement does not even suggest why the efforts which produced these utilization rates were inadequate.

- Another contractor had a minority utilization goal of 35%. The Department required a conciliation agreement because the contractor had achieved a minority utilization rate of "only" 28.6%. At a time when the female "goal" was 5.0%, the Department cited the same contractor for achieving a female utilization rate of "only" 3.1%. Moreover, the Department cited the contractor before the relevant year had ended. Whether the contractor could have achieved the 5% utilization "goal" for the full year remained to be seen.

- A third contractor had a minority utilization goal of 28%. Field personnel imposed a conciliation agreement on this contractor even though it had achieved minority utilization rates of 26%, 17% and 17% during the three months under review.

- Another contractor had achieved a female utilization rate of 4.2% in the first nine months of the relevant year. Once again, whether the contractor could have met the female "goal" -- which was 5% at the time -- by the end of the year remained to be seen. Nevertheless, field personnel also cited this contractor for "underutilizing" women.

- A fifth contractor had a minority utilization "goal" of 25%. Although it achieved minority utilization rates of

18%, 19%, 18%, 19% and 17% during the five months under review, field personnel required the contractor to sign a conciliation agreement.

- A contractor who had a minority utilization "goal" of 28% achieved rates of 17%, 22% and 19% during the four months under review. Nevertheless, field personnel also required this contractor to sign a conciliation agreement.

Unfortunately, these examples are not extreme ones. Rather, they are typical. They illustrate the meaning of Executive Order 11246 for the construction industry. The agreements reflect the real world all too accurately. The Labor Department's "goals" are absolute, inflexible quotas.

The Labor Department, again under the banner of the Executive Order, has also required "deficient" contractors to meet harsh and wholly unrealistic "make-up goals." One conciliation agreement shows that a contractor had failed to meet its 5% female "goal" in four crafts: carpenters, laborers, cement finishers and electricians. The conciliation agreement required the contractor to achieve "make-up goals" of 8.8%, 9.4%, 9.4% and 9.4%, respectively.

Another conciliation agreement states that a contractor had failed to meet its minority "goal" for carpenters, and its female "goal" for carpenters, laborers and cement masons. The conciliation agreement required the contractor to do the following:

BEST COPY AVAILABLE

Hire one (1) minority carpenter for 10 1/2 months (or as long as it takes to make up 1,704 deficit hours).

Hire one (1) female carpenter for 6 1/2 months (or as long as it takes to make up 1,012 deficit hours).

Hire two (2) female laborers for 7 months each (or as long as it takes to make up 2,138 deficit hours).

Hire one (1) female cement mason for 1 1/2 months (or as long as it takes to make up 197 deficit hours).

The conciliation agreement further provided:

> Recruited workers will be provided with permanent employment as available in an effort to make up the deficit hours (4,051). Every effort will be made to achieve the make up hours by the end of each stated timeframe. This timetable may be extended if opportunities do not occur to achieve make up hours. It must also be clearly understood that deficit hours must be made up over and above the applicable goals for each identified trade in the Chicago covered area. If, in the event, contractor has no work in the Chicago area, deficit hours will be made up in those areas in which the contractor has work. Any additional accumulated deficit hours will also be made up in the same manner and like timeframes. This Conciliation Agreement shall remain in full force and effect until such time as the contractor is found by OFCCP to have met all the terms of this Agreement.

The Labor Department's statistical approach to affirmative action continues to abuse construction contractors. A most recent examples occurred in August of 1985. In that case, the Department cited a contractor for failing "to achieve the minimum minority utilization goal of 12.7% for Truck Drivers and the minimum female utilization goal of 6.9% for Carpenters, Heavy Equipment Operators, Iron Workers, Truck Drivers and Laborers trades."

As the cited contractor explained to the Department, such

quotas have utterly absurd results:

> At the time of the review, we had a total of fifteen hourly employees, eleven white and four minority. We have only one or two truck drivers on the payroll at a time. Our overall goal for minorities was 12.7%; our actual percentage of minorities on the payroll was 26.7%.
>
> * * *
>
> If we were required to meet a quota for minorities and females in each of five trades (a total of five minorities and five females), it would mean that ten of the fifteen jobs would have to be reserved for minorities and females, leaving only five job positions available to white males. Given our applicant pool, such a hiring policy would result in unfair and illegal discrimination against white male applicants on the basis of their sex and race.
>
> Even if we could find a qualified minority female worker for each of the five trades, this would still mean that only 66% of the jobs would be available to the males who probably constitute 93% to 99% of our applicant pool.

As would all fair-minded Americans, the contractor found it "hard ... to understand that a small company which has nearly double its goal of minority hours and employs only two truck drivers should be subject to criticism for failure to meet a goal for that individual 'trade.'"

AGC supports affirmative action, but not quotas.

AGC supports recruitment and training, and other positive efforts to create new job opportunities, but not the rigid statistical formulas that produce quotas.

AGC does not believe that the construction industry should have to exclude certain Americans from serious consideration for employment because those Americans are neither minorities

AVAILABL

nor women.

The numbers which concern AGC's members are not the numbers which employers have adopted voluntarily, on their own initiative. Rather, the numbers which concern the industry are the numbers which the federal government has mandated. Behind those numbers lies the power to put an employer out of business.

In reality and in practice those numbers are quotas. The government cites construction contractors for not achieving statistical results. The government also insists that construction contractors who cannot achieve those results are not making good faith efforts. Directly or indirectly, the numbers drive the system. And so long as the numbers are there, they will continue to do so.

All of these abuses occur under the banner of Executive Order 11246. Until the Executive Order is revised, specifically to eliminate the goals, quotas, ratios and other statistical measures which now carry the force and effect of law, these abuses will continue.

AGC believes that affirmative action should relate to recruitment and training, especially in the construction industry,where employment may last for only a few days or weeks. Minorities and women have to acquire the skills to seize a continuing series of job opportunities.

In this regard, AGC has long supported efforts to permit minorities and women to accelerate their apprenticeship or other

BEST COPY AVAILABLE

training. AGC believes that they should advance as quickly as they can master the skills involved, without regard to their time in a program.

AGC supports recent proposals to amend Executive Order 11246. AGC supports the positive approach of recruitment and training for careers in construction that provide real opportunities, instead of non-productive careers resulting from government adjustable statistics.

Mr. EDWARDS. Well, we are very pleased to welcome our good friend, the gentleman from Georgia, and a member of the full committee, Mr. Swindall. Is he here?

Mr. DEWINE. Yes, he is on the far right.

Mr. EDWARDS. Welcome.

Mr. Swindall does a splendid job in his work here in Congress, and his constituents ought to be very proud of him. We're proud of him.

Mr. SWINDALL. Thank you, Mr. Chairman. And speaking of constituents, that's the reason I am here.

I am fortunate to have the privilege of introducing to the committee one of my very own constituents, and more importantly, a supporter of mine who, as president and chief executive officer of Hails Construction Co., a $15 million per year construction company that specializes in light industrial shopping centers and office buildings, but more importantly, today she is here in her capacity as president of Associated Builders and Contractors, and she is, incidentally, the first and only female to hold the position of president in its 35-year history. She comes before us today with experience not only in that capacity, and 15 years' membership in that organization, but also, as I mentioned, as an individual who has dealt with the issues at the level of management as well as in the field in construction, and it is my pleasure to introduce her here today.

Jean.

Mr. EDWARDS. Thank you very much.

Mrs. Hails, if you could come to the witness table. The other member of the panel is Vincent Apruzzese, an attorney from Springfield, NJ, who is the vice chair of the Labor Relations Council of the U.S. Chamber of Commerce.

We are glad both of you could join us, and Mr. Apruzzese, are you going to go first?

Mr. APRUZZESE. Thank you.

Mr. EDWARDS. Without objection, both of your full statements will be made a part of the record.

TESTIMONY OF VINCENT J. APRUZZESE, VICE-CHAIR, LABOR RELATIONS COUNCIL, U.S. CHAMBER OF COMMERCE; AND JEAN HAILS, 1986 PRESIDENT, ASSOCIATED BUILDERS AND CONTRACTORS

Mr. APRUZZESE. Thank you, Mr. Chairman.

On behalf of the chamber, I want to express our appreciation for this opportunity to discuss the chamber's views on the Department of Labor's Office of Federal Contract Compliance programs, and the proposals to revise the affirmative action requirements for Federal contractors under Presidential Executive Order 11246.

Let me make four brief points, because I understand, as you've just said, that our complete testimony will be entered into the record.

First, employers should expect vigorous enforcement of our civil rights laws. Discrimination against individuals on the basis of race, color, religion, sex, or national origin should not be tolerated.

Second, when individuals have been victimized by discrimination, those individuals are legally and morally entitled to be made whole. To put that person in a particular job that they would have had but for discrimination may be called preferential treatment or a quota by some, but when I use those terms I do not refer to such circumstances. Courts rightfully have come to use such a remedy in instances of discrimination.

Third, the specific and somewhat narrower issue we wish to focus on today is the appropriateness of imposing preferences based, not on any evidence of discrimination, but on the premise that, absent discrimination, a workforce shall be in statistical parity with the labor market around it.

This is the controversial premise underlying enforcement of Executive Order 11246. Such a results-oriented overemphasis on statistical analysis is contrary to the traditional American ideas of non-discrimination.

Finally, the original purpose of affirmative action, to take affirmative steps to ensure equal treatment and opportunity, regardless of race, color, religion, sex, and national origin, is a valid, and most significant concept. Unfortunately, it has been twisted into a process of Government-imposed numerical goals and timetables, i.e. quotas, intended to guarantee equal result, rather than equal opportunities.

Racial and ethnic classification and preferential treatment are wrong in any form, notwithstanding the fact that its proponents claim that it is good for minorities. The late Senator Hubert Humphrey, a leading advocate of the 1964 Civil Rights Bill, said, and I quote:

> Contrary to the allegations of some opponents of this Title, there is nothing in it that will give any power to the civil rights commission, or to any Court, to require hiring, firing, or promotion of employees in order to meet a racial quota, or to achieve a certain racial balance. That bug-a-boo has been brought up a dozen times, but is non-existent.

The attempt to establish quotas, whether explicit or under the euphemism of numerical goals and timetables, reflects a reversal of the civil rights revolution. Quotas move us away from equal opportunity, which we all support, to mandated economic and social

equality, which many of us do not support. Guaranteed economic equality has never been part of the heritage of a free society. The Government should not be the arbitor of the rewards of human effort.

The U.S. Chamber applauds the proposal to revise Executive Order 11246 to clarify that quotas and other discriminatory devices are not acceptable. These changes are long overdue.

Incidentally, I, like most, would be most interested in reading any actual draft of the—any proposed changes to determine its exact dimensions.

A Federal contractor can be pressured—he can now be pressured, without evidence of actual discrimination, to hire specific percentages of various groups, until its workforce is in statistical parity with the surrounding labor market. Stated simply, this is a quota. Obviously, it depends upon the enforcer.

The proposed modification would prevent the Government from finding a Federal contractor in noncompliance with the antidiscrimination rules simply because of a numerical imbalance in its workforce, that is a case would have to be made in a due process forum.

Despite what some people say, this will not eliminate affirmative action. Our concept of affirmative action includes the belief that the road to equal employment opportunity should not be paved with new varieties of discrimination. Affirmative action should mean equality of opportunity, not equality of results.

As Clarence Thomas, Chairman of the Equal Employment Opportunity Commission, wrote in USA Today, on September 5 of this year:

> The notion that blacks must be given preferences in order to succeed, and should not be judged by the same standards as other people, is founded upon the racist assumption that blacks are inherently inferior. No matter what the benefits might be concerning this assumption, it is far too great a price to pay.

He goes on to say that, as Labor Secretary Bill Brock has observed, this country "will have to have some form of affirmative action for the foreseeable future." Then adds Mr. Thomas, "But if we confuse affirmative action with quotas, goals, and timetables, or other types of group preferences, we will fail to address the real issues, and condemn the most disadvantaged in our midst to an ever bleaker future." In short, we must get to the root causes.

My personal views, and those of the Chamber, are not wedded to any change in the Executive order, but the thrust of these comments.

Thank you.

Mr. EDWARDS. Thank you very much.

[The statement of Mr. Apruzzese follows:]

BEST

Statement of the Chamber of Commerce of the United States

ON: OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS IN IMPLEMENTING EXECUTIVE ORDER 11246

TO: CIVIL AND CONSTITUTIONAL RIGHTS SUBCOMMITTEE OF THE HOUSE JUDICIARY COMMITTEE

BY: VINCENT J. APRUZZESE

DATE: NOVEMBER 7, 1985

The Chamber of Commerce of the United States is the world's largest federation of business companies and associations and is the principal spokesman for the American business community. It represents more than 184,000 companies plus several thousand other organizations, such as local/state chambers of commerce and trade/professional associations.

More than 92 percent of the Chamber's members are small business firms with fewer than 100 employees, 53 percent with fewer than 10 employees. Yet, virtually all of the nation's largest companies are also active members. We are particularly cognizant of the problems of smaller businesses, as well as issues facing the business community at large.

Besides representing a cross section of the American business community in terms of number of employees, the Chamber represents a wide management spectrum by type of business and location. Each major classification of American business—manufacturing, retailing, services, construction, wholesaling, and finance—numbers more than 14,000 members. Yet no one group constitutes as much as 29 percent of the total membership. Further, the Chamber has substantial membership in all 50 states.

The Chamber's international reach is substantial as well. It believes that global interdependence provides an opportunity, not a threat. In addition to the 53 American Chambers of Commerce Abroad, an increasing number of members are engaged in the export and import of both goods and services and have ongoing investment activities. The Chamber favors strengthened international competitiveness and opposes artificial U.S. and foreign barriers to international business.

Positions on national issues are developed by a cross section of its members serving on committees, subcommittees and task forces. Currently, some 1,800 business people participate in this process.

BEST COPY AVAILABLE

TABLE OF CONTENTS

I. Overview 1

II. Problems with the Executive Order 3

III. How OFCCP and the EO Operate 5

A. Utilization Analysis 6

B. Underutilization 8

C. Goals and Timetables 9

D. Good Faith Efforts 9

E. Affected Class Determinations 12

F. Jurisdictional Thresholds 12

IV. Major Reforms Needed 14

V. Conclusion 15

Appendix 1: Color-Blind Coalition Documents 16
Statement of Purpose and Summary Position

Appendix 2: Setting the Record Straight on
Executive Order 11246--
Quotas or Affirmative Action? 18

STATEMENT
on
OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS
IN IMPLEMENTING EXECUTIVE ORDER 11246
before the
CIVIL AND CONSTITUTIONAL RIGHTS SUBCOMMITTEE
of the
HOUSE JUDICIARY COMMITTEE
for the
CHAMBER OF COMMERCE OF THE UNITED STATES
by
Vincent J. Apruzzese
November 7, 1985

My name is Vincent J. Apruzzese. I am Vice Chairman of the U. S. Chamber of Commerce's Labor Relations Council and senior partner of the law firm of Apruzzese, McDermott, Mastro & Murphy of Springfield, New Jersey. Accompanying me today is Virginia B. Lamp, Labor Relations Attorney for the Chamber.

On behalf of the Chamber, I want to express our appreciation for this opportunity to discuss the Chamber's views on the Department of Labor's (DOL) Office of Federal Contract Compliance Programs (OFCCP) and its administration and enforcement of affirmative action requirements for federal contractors under Presidential Executive Order (EO) 11246.

I. OVERVIEW

Before addressing the details and the problems of EO 11246, let me just raise a few important points.

First, employers should expect vigorous enforcement of our civil rights laws. Discrimination against individuals on the basis of race, color, religion, sex or national origin should not be tolerated.

Second, when individuals have been victimized by discrimination, those individuals are legally and morally entitled to be made whole. To put that person in the job that they would have had, but for discrimination, may be called preferential treatment or a quota by some. But, when I use those terms today, I do not refer to such circumstances. Courts rightfully have imposed craft such a remedy in instances of discrimination.

BEST COPY AVAILABLE

Third, the specific and somewhat narrower issue we wish to focus on today is the appropriateness of imposing preferences based, not on any evidence of discrimination, but on the premise that, absent discrimination, a work force shall be in statistical parity with the labor market around it. This is the controversial premise underlying enforcement of EO 11246. Such a results-oriented overemphasis on statistical analysis is contrary to the traditional American ideas of nondiscrimination.

Finally, the original purpose of affirmative action -- to take affirmative steps to ensure equal treatment and opportunity regardless of race, color, religion, sex and national origin -- is a valid and important concept. Unfortunately, it has been twisted into a process of government-imposed "numerical goals and timetables" (i.e. "quotas") intended to guarantee equal results rather than equal opportunity.

Racial and ethnic classification and preferential treatment are wrong in any form, notwithstanding the fact that its proponents claim it is "good" for minorities. In this regard, the U. S. Chamber's Board of Directors has adopted the following policy statement:

> To ensure a competent work force, employers must have the right to employ or to promote best qualified applicants/employees without regard to race, sex, religion, color or national origin. In those areas where past economic, geographic or social conditions have deprived some persons of employment opportunities, employers should take affirmative action to recruit, employ, train and promote qualified members of the protected classes. Such outreach efforts might include special recruitment programs, training programs and provisional employment, but at no time should qualified applicants or employees be denied employment or promotion solely because they are not members of a protected class. Our concept of affirmative action includes the belief that the road to equal employment opportunity for one group should not be paved with new varieties of discrimination against other groups. While we oppose the imposition of quotas or other discriminatory devices on employers, we support and encourage measurable methods to increase participation in the work force through voluntary use of goals, timetables and good faith effort.

Federal contractors, as well as all employers, must not discriminate on the basis of race, sex, or other protected-class status. In addition, affirmative action -- as it originally was envisioned — is good public policy. In fact, most employers have accepted affirmative action and have demonstrated, in varying degrees, their commitment to this social policy.

AVAILABLE

The issue that has received so much attention the past few weeks is not the commitment to affirmative action, as some would have you believe. It is whether quotas, mandating goals and timetables or other discriminatory devices, are the proper way to improve opportunities for minorities.

Enforcement of EO 11246 by OFCCP typically has been arbitrary, unnecessarily burdensome, and repetitive. Agency officials often have often been antagonistic and inflexible (although substantial improvements have been made by the Reagan Administration). And, let there be no mistake about it, employers are forced through this program to make race and sex-conscious decisions that are, in effect, quotas. As Secretary of Labor Brock has stated: "You can't fight discrimination with discrimination."

II. PROBLEMS WITH THE EXECUTIVE ORDER

Proponents of the existing program are quick to allege that the instances of abuse are rare and that the program has produced demonstrable evidence of increased hiring and promotions of women and minorities.

We submit that abuse permeates the program and that the demonstrable progress by government contractors in increasing employment and promotional opportunities for minorities and women has been achieved in spite of OFCCP's efforts rather than because of them.

In testimony before a Senate Committee in 1981, Mr. Robert Beck, Chairman of the Prudential Insurance Company — a company that is willing to stand on its affirmative action record — detailed an ongoing OFCCP compliance review in which Prudential had invested some $1.5 million despite not one allegation of a substantive deficiency. And as Mr. Beck stated: "Most important of all, this entire process has not provided a single member of a protected class with new employment."

The Prudential experience is not isolated. The following are specific examples of comments we have received from Chamber members who have written us about their experience with OFCCP:

- "inflexible administration"
- "arbitrary imposition of internal policies and procedures"
- "demands for unnecessary, burdensome, and sensitive information"

- o "repeated inefficient practices"
- o "Compliance officers often seem preoccupied with form and format, not substance."
- o "inconsistencies from region to region, from office to office, and from inspector to inspector"
- o "What we have experienced is frustration -- frustration with the lack of appreciation and understanding of production operations on the part of compliance officers -- frustration with compliance efforts that address the mechanics and format of an Affirmative Action Program (AAP) rather than its content -- frustration with the OFCCP in its unbusiness-like conduct."
- o "Our experience . . . has been a continuous stream of supplying vast quantities of paperwork and meeting with endless delays in resolving problems."
- o "We object most strenuously to the amount of nonproductive time and effort spent in the course of a compliance review when that same energy could be channeled toward true affirmative action efforts."
- o "have sometimes been subject to unnecessary and unproductive threats of a show cause notice during expensive and drawn-out compliance reviews where we have made demonstrable achievements and discrimination is not even an issue"
- o "Our last 3 auditors wanted the format of our AAP to conform to their individual wishes."

We know numerous other examples along these lines exist and can be documented. Let me stress again that these examples are not isolated but, in fact, are representative of the way in which OFCCP routinely has administered and enforced the program.

These are not employers who are attempting to thwart their affirmative action obligations. Rather, they are typical of the vast majority of government contractors who accept this approach and would be accomplishing results much more rapidly but for the problems we have articulated involving the OFCCP.

BEST COPY AVAILABLE

The foregoing discussion leads to one unalterable conclusion regarding the OFCCP's administration and enforcement of the affirmative action program: unless fundamental changes occur, the program will never achieve its intended results of increasing employment and promotion opportunities for minorities and women, nor will it promote decisions which are based on merit and ability rather than protected class status.

III. HOW OFCCP AND THE EO OPERATE

The EO forces federal agents to focus on complex, rigid and technical guidelines -- not on whether the decision-making process is, in fact, discriminatory. The goal is not focused on equal opportunity and equal treatment for all, but rather on a vision of equal results for groups and special treatment for some.

One of our corporate members has a work force of 3500 people. The OFCCP compliance document for this company totalled 1300 pages at a cost of over $80,000. Despite there being absolutely no evidence of discrimination, an OFCCP local compliance officer found some technical problems in the compilation of the report, and a substantial amount of time and money was spent in negotiating an agreement on a very minor point (unrelated to discrimination, yet important enough to lead to harassment by investigators).

The Office of Management and Budget estimates that nationwide over 8-1/2 million hours each year are spent complying with these paperwork requirements. A report from the Equal Employment Advisory Council found that the cost to a major corporation for a single compliance review usually exceeds $20,000 and that contract compliance activities could be estimated to cost the Fortune 500 companies approximately $942 million each year -- nearly a billion dollars. Having said that, the same year that study was conducted, OFCCP's Fiscal Year budget justification report stated that the previous year's finding of discrimination only occurred in 4% of the 2632 compliance reviews conducted.

The latest figures show that compliance reviews have increased -- 5025 reviews in 1984. The companies which the U. S. Chamber represents tell stories about nitpicking investigators who, because of "statistical imbalances and underutilizations," walk into their companies with a guilty-until-proven-

BEST COPY AVAILABLE

innocent bias against the employer. They argue over availability rates, job groupings, the language in an affirmative action plan, and the order in which jobs are listed. It is the Chamber's contention that resources are being wasted on OFCCP compliance and are doing little to further the laudable goals which brought the program into existence.

EO 11246, first promulgated in 1965, forbids federal contractors from discriminating against employees and applicants because of race, color, religion, sex or national origin. Over time, changes were made to the EO program. Today the EO also requires federal contractors to "take affirmative action to ensure that" applicants and employees "are treated . . . without regard to their race, color, religion, sex or national origin." Note that this affirmative action requirement seems to take federal contractors further than those requirements of Title VII of the Civil Rights Act of 1964 yet still maintains a "color-blind" vision of treatment under the law. In 1971, the Nixon Administration promulgated Revised Order Number 4, which required that contractors correct so-called underutilization, thus implying that a statistical imbalance in the work force demands a "remedy" and firmly entrenching the use of mandatory goals as a critical part of the EO enforcement program.

I would encourage each of you, as employers and as Members of Congress (who are exempt from coverage of Title VII of the Civil Rights Act), to consider the practical implications of this EO.

A. Utilization Analysis

Each contractor must do a utilization analysis, comparing the utilization of minorities and women in the various job groups within their work force with the availability of minorities and women in the appropriate labor market. If this comparison indicates that minorities or women are underutilized in one or more job groups -- despite there being no evidence of actual discrimination -- goals and timetables are required to correct this deficiency. The invariable, yet highly debatable, premise is that unless you are discriminating, your work force will match precisely the statistical make-up of the labor market surrounding you.

A utilization analysis by a contractor requires a minimum of five stages:

1. A determination of the appropriate labor area
2. A factual analysis of the following eight factors:

   - o the minority population of the labor area surrounding the facility (for women, the availability of women seeking employment in the labor or recruitment area);
   - o The size of the minority or female employment force in the labor area surrounding the facility;
   - o the percentage of the minority or female work force as compared with the total work force in the immediate labor area;
   - o the general availability of minorities or women having requisite skills in the immediate labor area;
   - o the availability of minorities or women having requisite skills in an area in which the contractor or subcontractor can recruit reasonably;
   - o the availability of promotable and transferable minorities or women within the contractor's or subcontractor's organization;
   - o the existence of training institutions capable of training persons in the requisite skills; and
   - o the degree of training which the contractor or subcontractor is reasonably able to undertake as a means of making all job classes available to minorities or women.

3. A determination of the availability of minorities and women for employment within that category
4. An identification of the ethnic and sexual composition of the work force within that category
5. And, lastly, if the percentage of minorities or women available in any category exceeds the percentage of minorities or women employed in that category, the contractor must designate that category as a deficiency category.

AVAILABLE

The government typically defines availability as the number of minorities or women who have the necessary skills required for entry into a job group or who are capable of acquiring them. Contractors normally define availability as the number who possess the necessary skills to fill an opening. The two definitions are hopelessly at odds. One focuses on current skill possession, while the other centers on a person's capabilities, a virtually impossible feature to measure with any objectivity.

Separate availability analyses must be prepared for each job group, for women, for total minorities, and for each minority group representing more than 2 percent of the population in the appropriate labor market. Also, availability must be stated as a percentage.

The subjectivity of such determinations is a constant source of confusion and consternation to contractors. The eight factors listed above rarely apply to any one job, and the importance of certain factors varies depending on the job in question. In addition, the factors are not mutually exclusive.

Unfortunately, any determination of availability, no matter how well it is documented, is in large part an estimate and, thus, subject to interpretation. Often, during the compliance review process, availability represents a negotiated compromise between the contractor's estimate of the number of minorities and women actually qualified for a job and the government's estimate of the number of minorities and women who would be available absent discrimination. The ultimate determination, therefore, is a subjective judgment through a process which permits the government to exercise broad arbitrary leverage.

B. Underutilization

OFCCP defines underutilization as occurring where there are fewer minorities and women in a job group than reasonably would be expected, given their availability. The agency's compliance manual, however, defines underutilization as any numerical disparity, even if only a "fraction" of a person is involved.

For example, if a company has a job group which is comprised of 50 employees, including 5 minorities, it would be considered underutilized if OFCCP determines availability for this group to be 11 percent. Eleven percent of 50 is 5.5. Because the contractor employs only 5 minorities, it is half a person away from utilization and, therefore, must set a goal for this particular job group.

Based on this example, you can see how the problems in deriving accurate, objective availability rates are compounded by its use in the utilization analysis.

C. Goals and Timetables

Once underutilization is found within a job group, the contractor or subcontractor must set goals to eliminate the deficiency. "Ultimate" goals must be set which are designed to achieve a percentage representation of minorities and women equal to their availability for the job group in question. Timetables for achieving these ultimate goals also must be established along with "annual" goals, which are designed to measure progress towards the "ultimate" goals. The "annual" goals must be expressed numerically and may exceed actual availability in order to bring the contractor into full utilization as quickly as possible. As with all components of an affirmative action plan, goals and timetables are subject to annual revision.

D. Good Faith Efforts

In practice, there always has been a substantial question as to whether goals and timetables are simply euphemisms for quotas. OFCCP has maintained that they are not, that they are merely targets. It claims that failure to meet a goal will not result in noncompliance if a contractor can demonstrate to the agency's satisfaction that "every good faith effort" to implement the goal has been undertaken. For example, a contractor who falls short of a goal will not be held responsible if it can prove extenuating circumstances, such as an unanticipated decrease in the rate of employee turnover or the cancellation of a major contract that would have generated more job opportunities.

On the other hand, good faith efforts are known more frequently as the arbitrary discretion of an individual compliance officer. One of our members, after submitting its affirmative action plan under the EO, was asked for the following information -- but was told not to limit itself to this information when it responded:

a. A summary of affirmative personnel actions taken to eliminate underutilization in your work force, including a listing of goals by EEO-1 category with accomplishments shown and/or specific reasons for lack of accomplishments.

b. A statistical and rhetorical analysis of applicant flow for the past twelve months by race, sex and job classification within the nine EEO-1 job categories.

c. A statistical analysis of all new hires during the past twelve months broken down by race, sex and job classification within each EEO-1 job category.

d. A statistical analysis of all terminations during the past twelve months broken down by race, sex and job classification within each EEO-1 job category.

e. A statistical analysis of upgrades/promotions during the past twelve months broken down by race, sex and job classification within each EEO-1 job category.

NOTE: A promotion is defined as any personnel action resulting in a movement to a position of greater skills, effort or responsibility. Wage or salary increases alone do not determine a promotion.

f. A statistical analysis of all employees in layoff status. It also is requested that you make available a listing of employees in layoff status by job classification, race, sex and period of eligibility for recall.

g. A current seniority and/or personnel roster, listing all employees at your facility by race, sex, job classification, pay rate or grade. (Pay information can be omitted for chief executive officers of the company).

h. A copy of Part I and Part II of the most recently filed EEO-1 report and copies of those filed from 1970 to the present date.

i. A copy of all current bargaining agreements, if applicable.

j. A current organizational chart, reflecting EEO responsibility to the lowest management level.

k. A list of community organizations and/or community leaders contacted during the past twelve months.

l. A summary of recruitment activities during the current AAP year, including a list of referral sources.

m. A summary of all training programs offered during the current AAP year. Each training program summary should include name, race, sex and EEO-1 category, and indicate if the individual completed the training. Also indicate those courses that were designed to prepare persons for immediate upgrades or promotions.

n. A listing of all current government contracts with name of agency, contract number, dollar amount, with the designation of prime or subcontract. If there are no government contracts at your space facility, please list the government contracts held by your corporation (preferably Corporate Headquarters) identifying information listed in this paragraph.

o. A list of employees or applicants tested during the past twelve months showing:

1. Name, sex and racial/ethnic group.
2. Date of test.
3. Test scores (if more than one test is administered, note the name of each test, composite score and cut-off requirements).
4. Validation study material relative to 41 CFR 60-3, Employee Testing and Other Selection Procedures, dated 2 October 1972, and a copy of Certificate of Validation, if tests are performed by non-company recruitment sources.

AVAILABLE

p. Two copies of a revised AAP, with all ten ingredients cited in Paragraph 60-2.13 of Revised Order No. 4.

q. Dun and Bradstreet number for your facility and your Corporate Office.

r. A list of all vendors and/or suppliers with contracts with your firm, or corporate office, in excess of $50,000 per calendar year.

E. Affected Class Determinations

AAPs also are required to contain the remedial steps a contractor will undertake to correct any "affected class" within its work force. It is OFCCP's position that EO 11246 requires not only prospective action but also the elimination of past, systemic discrimination.

Each AAP must have a work force analysis which is a listing of all the job titles at the facility in question, ranked from the lowest- to the highest-paid within each department or organizational unit. The work force analysis then is used by OFCCP to determine the presence of an affected class.

OFCCP's compliance manual cites evidence of an affected class by: substantial under-representation; adverse impact (i.e., employment policies which have a disproportionately negative effect on women and minorities); concentrations; wage discrimination; policies which perpetuate past discrimination; and policies discriminatory on their face.

Where it finds affected classes, the agency normally seeks "rightful place" modifications and, more recently and frequently, back pay for members of the class.

Indeed, in practice, OFCCP employment opportunity specialists have assumed the posture that seeking affected class relief is now their primary function, despite the fact that Congress specifically vested the Equal Employment Opportunity Commission (EEOC) with that charge.

F. Jurisdictional Thresholds

Some may say if a company does not want to comply with such a burdensome, time-consuming and expensive paperwork scheme, it simply should

not contract with the federal government. The problem with that is that the jurisdictional claws of the EO reach incredibly far into our economy to companies which never conceived that they would be labeled a "federal contractor" for purposes of these requirements. The truth is that OFCCP's authority has been expanded to the point that it is virtually impossible for an employer to avoid being a government contractor subject to it's jurisdiction. Let me give you four examples of the rules OFCCP has used to extend its jurisdiction over employers, regardless of whether they have chosen to be government contractors.

(1) The EO, on its face, provides that if a contractor is to be covered by it, that fact shall be stated out in the contract itself. In view of all that is entailed in complying with the EO, notice is a vital element of fairness. But OFCCP has, in effect, written this notice provision out of the EO. Its regulations authorize it to assert jurisdiction based on contracts which make no reference whatsoever to the EO. The fact that the contractual notice may have been omitted entirely through the fault of the contracting agency, and through no fault of the contractor, makes no difference. The fact that the contractor may have had no notice of the omission makes no difference. The hardship this regulation may work on the contractor makes no difference.

This is wrong. The federal government is responsible for including EO provisions in contracts covered by the EO. OFCCP is an agency of the federal government. If the federal government fails to draft its contracts correctly, it is not fair to make the private contractor suffer the consequences. Clearly, fairness should provide that OFCCP cannot assert jurisdiction based on contracts which do not state specifically that they are covered by the EO.

(2) It commonly is believed that contracts under $10,000 are exempt from coverage under the EO. In fact, however, OFCCP's regulations do not bind OFCCP to that threshold amount. It also can assert jurisdiction over contractors who have no government contracts or subcontracts over that amount if their government contracts or subcontracts total $10,000 in any one year. This makes it much harder for an employer to know whether signing a particular contract will, in fact, subject him to the EO.

Under the previous administration, OFCCP considered extending its rules on aggregation so that they would apply not only to the $10,000 threshold for coverage but also to the $50,000 threshold for written AAPs.

AVAILABLE

(3) The EO covers subcontractors--employers who contract with companies which are, in turn, government contractors. Prime contractors are supposed to notify their subcontractors if they are covered by the EO, but in practice it is often impossible for them to separate goods and supplies which go into their government contracts from those which do not. Even if they could do this, the rules on aggregation make it almost impossible to know when a subcontractor has reached the threshold amount for coverage. To protect themselves, most companies believe they must require their suppliers to sign certificates that they are in compliance with EO 11246, regardless of whether their suppliers are, in fact, covered by the EO. The suppliers have the choice of signing these certificates or losing the business. They often have no way of knowing whether the EO really applies to their contracts. But, if the issue is raised, these certificates can be used against them as admissions of coverage.

(4) The final factor which undercuts employer choice is the fact that, if an employer has one contract covered by the EO, his whole work force is covered, including employees who have no connection whatsoever with the government contract work. For example, one officer in one subsidiary of a large company unknowingly can sign a contract covered by the Order. It can be a contract that makes no reference to the EO or a contract under the $10,000 threshold. Under OFCCP rules, all of the employees of that individual's company, as well as all of the employees of all of his affiliate companies as well, are suddenly covered by the Order. This can happen even though employees in these affiliates do no government work at all.

IV. MAJOR REFORMS NEEDED

As the Subcommittee moves forward in its hearings, it will be exploring potential solutions to the major problems which have arisen. One of the difficulties inherent in this process is the tendency to seek changes within the existing framework of the program rather than to step back and consider an entirely new approach. There are fundamental problems in the enforcement and in the objectives, as they have evolved, of this program. This Subcommittee could play a significant role in highlighting the need for regulatory relief for contractors, reemphasizing the importance of prohibiting discrimination and refocusing on the rights of individual workers, not on a rigid statistical parity.

We would suggest that the Subcommittee give serious consideration to the changes the Reagan Administration is considering. It is our understanding that part of the proposed revisions to the EO will include abandoning the existing overreliance on statistical disparities. Statistics would be the beginning of an inquiry, not the end. Voluntary goals and timetables still could and still would be used by contractors. Quotas and other discriminatory devices would be prohibited. This clarification is desperately needed.

V. CONCLUSION

The problems with the EO focus on its evolution from a means of ensuring equality of opportunity to a means of enforcing an equality of results based on group status.

Preferential treatment by use of quotas are not what most Americans want, nor is it legally or morally right. The vast majority of the American public rejects the concept of quotas. This is true regardless of race or sex. One recent poll in which the Subcommittee may be interested appeared in the August/September 1985 issue of Public Opinion magazine. This poll looked at the divergence of opinion between black Americans and their leaders. When asked whether they thought minorities should be given preference in obtaining jobs or college placement, 77 percent of the leaders answered "yes." On the other hand, 77 percent of black Americans answered that ability should be the main consideration, not preference.

The Chamber has joined with a broad range of business and ethnic groups to work for a strengthening of the EO to specify that it does not sanction the use of quotas. In the appendix to our testimony, I enclose materials relating to this effort.

When the final version of Title VII of the Civil Rights Act of 1964 was passed, it was the culmination of a whole series of safeguards against race-conscious, results-oriented administration of the Act. It has been said that "preferential treatment, positive discrimination, goals, timetables, numerical standards, quotas to achieve racial balance -- all were thoroughly discussed during the framing of the Civil Rights Act and all were rejected."

The Chamber believes the EO will not achieve its intended results of ending discrimination, increasing opportunities for employment and promotion for minorities and women, and treating all equally, without regard to race, sex or other protected group status—unless changes are made.

COPY AVAILABLE

STATEMENT OF PURPOSE

THE COLOR-BLIND COALITION includes academic, professional, ethnic, business and other organizations and individuals who share a concern over the direction which affirmative action has taken.

The members of the coalition believe that discrimination on the basis of race, color, religion, sex, or national origin is absolutely intolerable, for it destroys the fundamental principles uniting a democratic and pluralistic society. Each American should be treated as an individual, without regard to immutable characteristics or affiliations. Both public and private decisionmakers have the obligation to judge others on their merits and qualifications without regard to group membership.

We also support affirmative action, but believe that it has taken a wrong turn. We hope to correct its course. We hope that affirmative action will once again represent positive efforts to ensure equality of opportunity, providing assistance in the form of education, training and outreach to those who would not otherwise acquire the qualifications necessary to make that concept a reality.

Because we believe that civil rights are individual rights, and not group entitlements, we disavow those policies, programs or systems which require preferential treatment for non-victims of discrimination. We commit ourselves to identifying and eliminating those policies and practices which require such preferential treatment.

To these ends and because the vast majority of Americans agree that merit, and not group membership, should be the basis of determining societal benefits and opportunities, we commit ourselves to educating the public, the media, the Congress, the Administration and others on our views, and the programs or policies we identify as contrary to individual rights. We tolerate and welcome a diversity of opinions on the means to achieve the ends to which we agree, but believe that a void in leadership requires our participation in the public policy process.

Appendix 1

EXECUTIVE ORDER 11246

SUMMARY POSITION

Affirmative action is good public policy. Quotas and other required "goals and timetables" are not. When superimposed on affirmative action, such requirements distort its purposes and objectives. Affirmative action becomes a process of exclusion.

Affirmative action does not have to sow bitterness and resentment among fair-minded and hard-working Americans. The road to equal opportunity should not be paved with new varieties of discrimination against other groups.

The Color-blind Coalition believes that affirmative action should consist of recruitment and training, and ultimately, that it should coincide with innovative efforts to improve public education in minority communities and with similar efforts to introduce women to nontraditional jobs. The Coalition believes that the original concepts of affirmative action were positive concepts that should be restored.

For these reasons, the members of the Coalition are united in their support for proposals to redirect Executive Order 11246.

SETTING THE RECORD STRAIGHT ON EXECUTIVE ORDER 11246 — QUOTAS OR AFFIRMATIVE ACTION?

President Reagan has before him proposals to revise Executive Order 11246, the rule which sets employment obligations for federal contractors. The proposed revisions, if adopted, would eliminate the requirement for federal contractors to use quotas and other discriminatory hiring practices. However, use of such voluntary goals and timetables would remain permissible, so long as they did not discriminate against individuals.

WHAT IS EXECUTIVE ORDER 11246?

It is the latest in a series of Executive Orders dating back to 1941 that require nondiscrimination in employment practices by federal contractors. The Order also requires "affirmative action" to ensure nondiscrimination in employment by federal contractors working on federally assisted construction contracts. This requirement, which was originally understood to mean outreach recruitment, and training, has evolved into a rule requiring federal contractors to establish hiring quotas for minorities and women.

WHAT'S WRONG WITH THIS EXECUTIVE ORDER?

A federal contractor is now required -- WITHOUT EVIDENCE OF ACTUAL DISCRIMINATION -- to hire specific percentages of various groups until its work force is in "statistical parity" with the surrounding labor market. Thus, federal contractors must treat people in the labor market according to their ethnic classification, and the statistical composition of the work force can determine compliance with the Order's nondiscrimination requirement.

WOULD THESE PROPOSED REVISIONS "GUT" AFFIRMATIVE ACTION PROGRAMS?

No, not as they were originally conceived. Affirmative action programs were designed to correct past discrimination by actively seeking to ensure that minorities are considered for jobs or promotions, without treating them differently. Over time affirmative action became perverted to mean quotas, reverse discrimination, and an effort to guarantee equal results, not equal opportunity.

WOULD THE PROPOSED REVISION REQUIRE FEDERAL CONTRACTORS TO STOP USING GOALS AND TIMETABLES?

No, provided that the goals and timetables do not operate to discriminate against anyone.

WOULD THE PROPOSED REVISION PROHIBIT THE USE OF STATISTICS IN ESTABLISHING DISCRIMINATION CLAIMS?

No. Statistics can serve as the beginning of an inquiry, not the end. Statistics would still be useful in establishing evidence of unlawful discrimination and could trigger audits into employment practices. The modification simply would prevent the government from finding a federal contractor to be in noncompliance because of a statistical imbalance in the composition of its work force.

173

WOULD THE PROPOSED REVISION TURN BACK THE CLOCK ON CIVIL RIGHTS?

No. The proposed revision would restore the original intent of civil rights --to ensure equal opportunity for all individuals and equal treatment under the law, regardless of gender or minority status.

WOULD THIS ELIMINATE REMEDIES FOR VICTIMS OF DISCRIMINATION?

Absolutely not. The Executive Order, of course, continues to forbid discrimination. This modification does not alter the rights of individuals who have been discriminated against. Instead, this modification is focused narrowly at ensuring that those who have never themselves suffered discrimination do not receive an unfair advantage because of race or gender. When that occurs, it occurs at the expense of an innocent person with better qualifications and who can better provide what an employer needs.

WHAT ARE THE ADMINISTRATIVE PROBLEMS WITH THE EXECUTIVE ORDER?

In 1970, there were 16 pages of regulations accompanying this Executive Order. Today, there are 192 pages. The federal government spends nearly $40 million to administer these regulations, while it has been estimated that the private sector spends 8-1/2 million hours/year filling out the various forms associated with these requirements. While the original intent was to ensure nondiscrimination and equal opportunity for all, the process has become perverted into a costly system of quotas and ratios which are contrary to traditional ideals of nondiscrimination without regard to race, sex or group status.

WHAT IS THE BEST ANSWER TO THE UNDERLYING PROBLEM?

In those areas where past economic, geographic or social conditions have deprived some individuals of employment opportunities, employers should take affirmative action to recruit, train and promote such qualified persons. The road to equal employment opportunity for one group should not be paved with new varieties of discrimination for other groups.

For more information, contact: Virginia Lamp or Fred Krebs, U.S. Chamber of Commerce (202) 463-5517.

Mr. EDWARDS. Mrs. Hails.

Mrs. HAILS. Thank you, Mr. Chairman, and thank you for allowing me to appear before you today to testify on the issue of affirmative action.

As president of Hails Construction Co. in Roswell, GA, suburb of Atlanta, and as incoming president of Associated Builders and Contractors, a national trade association representing 18,000 general contractors, subcontractors, and suppliers, I am glad to present the construction viewpoint on affirmative action.

While I have a lengthy prepared testimony—which I would like to submit for the record—I will spend just a few minutes today to express our deepest concerns with Executive Order 11246, and the OFCCP implementing regulations.

Forty-eight percent of all ABC members do contract work for the Federal Government, and are therefor subject to the rules and regulations of the OFCCP, which is, of course, the enforcement arm of Executive Order 11246.

ABC wants to make it clear, from the beginning, that we support the principles embodied in our equal employment opportunity laws. We believe that discriminatory practices which deny individuals the opportunity of learning skills or working in the contruction industry are legally, economically, and morally harmful to our Nation and our industry. In addition, ABC supports the recruitment and training of minorities and women.

Not only is this our moral responsibility, but our industry is facing a potential critical shortage of skilled labor in the construction trades. The implementing regulations set forth by OFCCP have lost sight of the basic mission of any affirmative action program: to promote the recruitment, training, and hiring of minorities and women.

None of these elements can stand alone. However, we feel that OFCCP has focused almost entirely on the third element, hiring, to the detriment of the affirmative action program.

Training is the key to affirmative action in the construction industry. Without adequate apprenticeship programs and programs which accelerate the entrance of apprentices into the industry, women and minorities cannot be introduced to these fields which have, unfortunately, traditionally been occupied by a majority of white males.

ABC believes that it is time for the administration and the Congress to reexamine the fundamental concepts which underlie the Government's present approach to affirmative action, and develop alternative which would more appropriately address the original intent of the Executive order, to require nondiscrimination in employment practices by Federal contractors.

Designed to correct past discrimination by actively seeking to ensure that minorities and women are considered for jobs or promotions without treating them differently, OFCCP regulations have been translated to mean quotas, reverse discrimination, and an effort to guarantee equal results, not equal opportunity. I am sure that all of us in the room today believe that the road to equal employment opportunity for one group should not be paved with new varieties of discrimination for other groups.

While ABC supports affirmative action programs, we oppose the mandatory implementation of quotas or numerical goals. The regulations implementing Executive Order 11246 should be totally rewritten, eliminating any statistical quota or goal mandates.

In return, we support the implementation of a voluntary record-keeping provision that would provide an employer or contractor with an "affirmative defense," such as contained in the legislation now being considered by the Senate for immigration reform.

I am confident that the overall compliance percentage with this voluntary, self-regulation, would be very high, and would, in turn, foster both entrance of minorities and women into the construction trades, yet, without the burdens caused by current regulations.

I'd like to comment on some of the problems.

No. 1: Training; the biggest obstacles facing contractors attempting to comply with OFCCP regulations, Mr. Chairman, is that we do not have the required number of individuals, minorities and women, qualified for employment on construction sites today. Both union and open shop construction employment averages 4.5 million a year, but minorities account for only 10 percent of that figure, and women account for only 1.97 percent of the blue collar labor force.

There are not sufficient numbers of minorities and women in the construction labor force to meet the goals imposed by OFCCP. The program has thus created the need to bring unprecedented numbers of untrained individuals onto construction job sites in an extremely short period of time.

Our training has accelerated, and has expanded rapidly, but training must be commensurate with safety. It is curious to note that the construction industry cannot meet OFCCP mandated goals for women through existing apprenticeship programs, even if all new apprenticeship slots were reserved exclusively for women. And this, of course, would not resolve the problem of meeting the goals for minorities.

ABC is proud of all of our apprenticeship training programs, especially our wheels of learning program. We retain the highest numbers of minorities and women in all the construction trades training programs. Retention is a critical factor in apprenticeship training. The national figure for construction trades is 35 percent, which is low, but our apprenticeship programs retain nearly 50 percent of our minority and women enrollment, which averaged 10 percent and 3 percent, respectively, of the 35 percent.

Unfortunately, Federal regulations governing apprenticeship training programs from the Bureau of Apprenticeship Training, and the denial of the use of helpers on Federal construction sites contained in the Davis-Bacon statute, limit job opportunities for women and minorities in construction. ABC would be happy to work with the Congress to remove these barriers.

The second problem: Coverage thresholds. Currently, smaller contractors, with contracts just over $10,000, must comply with the minority and female utilization goals, and the 16 affirmative action steps. This places the smaller contractor at a direct disadvantage to the larger builder. As we know, small businesses provide the greatest number of job opportunities. We should recommend that a

tiered system be implemented, as outlined in my testimony that you have.

The third problem is unvalidated goals. The OFCCP goals for the construction industry have no statistical basis and are arbitrarily established. The goals fail to take into consideration the variety of skills and different levels of training required for the various trades in the construction industry.

OFCCP's regulations provide that all contractors in a geographical area must meet the same hiring goals. Subcontractors and specialty contractors engaged in the hard-to-learn trades, those with long apprenticeship periods, such as electrical and plumbing, which have the greatest difficulty attracting minority and female trainees, realistically cannot meet the same hiring goals as other building craft employees.

The fourth problem is use of quotas. Goals have been enforced as quotas by the OFCCP. Contractors who fail to meet their goals are usually required to sign a conciliation agreement. This is cited as a deficiency and a basis for administrative action. ABC believes that OFCCP should take immediate action to end the use of quotas disguised as goals in its affirmative action programs.

Due to the complexity of meeting the goals in the construction industry as I have outlined earlier, failure to meet the goals alone should not constitute a basis for any administrative action.

Fifth problem: Affirmative action steps. In my written testimony, I have reviewed the steps necessary to be found in—necessary to be in compliance with affirmative action programs. These steps included keeping lengthy lists of minority and women's groups, subcontractors and suppliers; constant notification and recordkeeping on each new project or business development; and an extraordinary amount of documentation including letters, memoranda, telephone logs, and more, to prove compliance. Failure to document just one step can result in a finding of noncompliance, requiring the contractor to sign a conciliation agreement, or face potential debarment.

The last problem I will address is paperwork. The incredible paperwork burden imposed by OFCCP has increased the overhead tremendously of Federal construction contractors. Executive Order 11246 creates an average of an additional 16 hours of paperwork each month, and increased administrative costs by an average of 13.6 percent. ABC believes that the least OFCCP regulation should attempt to produce this paperwork burden by permitting the contractor to demonstrate, rather than document, its actions under any mandated steps.

In summary, ABC firmly believes that the Government's Affirmative Action Program has failed to meet its objectives. ABC commends the committee for opening up this discussion in an effort to take the needed important steps toward reform. As I indicated earlier, ABC firmly opposes any mandated quotas and numerical goals, which the regulations have come to mean during the past decade.

We support the intent of Executive Order 11246, assuring affirmative action, but cannot tolerate the current problems and unnecessary costs associated with OFCCP's Affirmative Action Program.

Rather than increasing the numbers of minorities and women in the construction industry, OFCCP has only produced a mind-boggling maze of paperwork and procedures. A simply pruning of this maze will not simplify the plight of the construction contractor. OFCCP must strike at the root of the problem.

Therefore, ABC recommends that Congress and the administration develop and implement an affirmative action strategy stressing recruiting and training, and not just the hiring of minorities and women.

Unfortunately, affirmative action has evolved to the point where discrimination to achieve nondiscrimination is occurring. I hope that the Federal Government can refocus affirmative action on its original intent: That of insuring equality of opportunity to the fullest extent possible, instituting and maintaining positive steps to expand the opportunities for disadvantaged Americans, providing assistance in the form of education, training, and outreach to those who would not otherwise acquire the qualifications necessary to make equality of opportunity a reality.

ABC is committed to maintaining and expanding these opportunities.

Thank you, Mr. Chairman.

Mr. EDWARDS. Thank you very much, Mrs. Hails.

[The statement of Mrs. Hails follows:]

Associated
Builders and
Contractors, Inc.

729 15th Street, N.W.
Washington, D.C. 20005
(202) 637-8800

TESTIMONY OF

JEAN HAILS, PRESIDENT

HAILS CONSTRUCTION COMPANY

1986 PRESIDENT, ASSOCIATED BUILDERS AND CONTRACTORS, INC.

BEFORE THE

CIVIL AND CONSTITUTIONAL RIGHTS SUBCOMMITTEE

HOUSE JUDICIARY COMMITTEE

U.S. HOUSE OF REPRESENTATIVES

NOVEMBER 7, 1985

ON

AFFIRMATIVE ACTION

MR. CHAIRMAN AND MEMBERS OF THE COMMITTEE:

It is indeed a pleasure to appear before the Subcommittee on Civil and Constitutional Rights House Judiciary Committee, and testify on the issue of affirmative action. This is indeed an area that has received much attention during the past several months and I am glad to have the opportunity to express the concerns of the construction industry on the impact of Office of Federal Contract Compliance Programs' regulations implementing Executive Order 11246.

I am Jean Hails, President of Hails Construction Company in Roswell, Georgia. The Hails Construction Company is a $15 million general construction firm located near Atlanta earning an excellent reputation in commercial and industrial development.

Associated Builders and Contractors (ABC) is a national construction industry trade association representing more than 18,000 firms nationwide. The members, contractors, subcontractors and suppliers, of ABC believe in the "merit shop" philosophy of awarding construction contracts to the lowest responsible bidder. Today more than 75% of all construction in this country is done the merit (open) shop way. In August, 1985 I was elected the 1986 President of Associated Builders and Contractors, so I am pleased to bring to the committee the views of my colleagues who are ABC.

Forty-eight percent of all ABC members do work for the Federal government. They, thus, become subject to the rules and regulations of the Office of Federal Contract Compliance Programs (OFCCP).

BEST COPY AVAILABLE

As you know, OFCCP administers the enforcement of Executive Order 11246, which prohibits employment discrimination by government contractors based on race, color, sex and religion, or national origin and mandates affirmative action in employment. OFCCP also enforces section 503 of the Rehabilitation Act of 1973 and section 402 of the Vietnam Era Veterans Readjustment Act which require federal contractors to employ and advance in employment handicapped, disabled veterans and Vietnam-era veterans.

ABC wants to make clear from the beginning that we support the principles embodied in our equal employment opportunity laws. We believe that discriminatory practices which deny individuals the opportunity of learning skills or working in the construction industry are legally, economically, and morally harmful to our nation and our industry.

In addition, ABC supports the recruitment and training of minorities and women. Not only do we believe that this is our moral responsibility, but our industry is facing a potential critical shortage of skilled labor in the construction trades. The United States currently produces less than 50,000 skilled construction workers a year, which is less than 25% of the number needed. The problem will become more serious as the U.S. Bureau of Labor statistics projects a shortage of 1.9 million skilled construction workers by 1990.

OFCCP seems to have lost sight of the basic mission of the program -- to promote the recruitment, training and hiring of minorities and women. In fact, ABC believes that the basic elements of affirmative action are recruitment, training and hiring. None of these elements can stand alone. OFCCP, however,

has focused almost entirely on the third element, hiring, to the detriment of the affirmative action program.

ABC believes that it is time for the Administration and the Congress to reexamine the fundamental concepts which underlie the government's present approach to affirmative action. We urge the executive branch to take this opportunity to develop and implement a more positive regulatory strategy encompassing all three elements of affirmative action.

Last August, we all heard of the "draft" of a new executive order to replace Executive Order 11246. To date the official text of this executive order has not been released, nor are we here today sure that there will even be a new executive order. What we have been afforded is the opportunity to examine the entire set of regulations associated with the implementation of Executive Order 11246 and discuss alternatives which would more appropriately address the original intent of this order to require non-discrimination in employment practices by federal contractors. Affirmative action programs were designed to correct past discrimination by actively seeking to ensure that minorities and women are considered for jobs or promotions, without treating them differently. Over time, however, affirmative action has translated to mean quotas, reverse discrimination and an effort to guarantee equal results, not equal opportunity. I am sure that all of us in the room today believe that the road to equal employment opportunity for one group should not be paved with new varieties of discrimination for other groups.

While ABC supports affirmative action programs, we unalterably oppose the mandatory implementation of quotas or numerical goals. We believe that the regulations implementing Executive Order 11246 should be totally rewritten eliminating

BEST COPY AVAILABLE

any statistical quota or goal mandates. In return, we support the implementation of a voluntary recordkeeping provision that would provide an employer or contractor with an "affirmative defense" such as the legislation now being considered by the Senate for immigration reform. I am confident that the over all compliance percentage with this form of regulation would be very high, fostering both entrance of minorities and women into the construction trades, yet without the current regulatory detriments to the industry.

However, I would like to spend the balance of my time this morning discussing various aspects of the current implementation regulations and setting forth alternatives which would make the system responsive both to minorities and women AND the construction industry.

TRAINING

Each year 48% of ABC's members acquire federal or federally-assisted construction project contracts. They, thereby, become directly subject to the rigorous rules and regulations of the OFCCP, the Bureau of Apprenticeship and Training (BAT) and the Wage and Hour (the Davis-Bacon Act requirements) Division of the DOL. No federal agencies have greater impact on the construction contractor's hiring and employment practices than these three. Yet these agencies have implemented regulations and policies which work at cross-purposes to each other and obstruct affirmative action for women and minorities.

Both union and open-shop construction employment averaged about 4.5 million during 1980 and has increased steadily each year. Yet minorities accounted for only an average 10% and females account for 1.97% of the blue-collar construction labor force. There are not now sufficient number of minorities and women in the construction labor force to meet the goals imposed by OFCCP. The program has thus created a need to bring unprecedented numbers of untrained individuals on to construction job-sites in an extremely short period of time. Also our industry faces the need to train such individuals commensurate with the productivity and safety factors so vital to construction competition. Close examination of the current system of training for entry into the construction crafts, clearly reveals that it is incapable of meeting these needs.

Why? Pursuant to the Davis-Bacon Act and DOL's regulations implementing (29 CFR Part 1), no federally-involved construction contractor is permitted to pay a worker less than the prevailing journeyman wage rate unless the individual is in a training program registered in conformity with Bureau of Apprenticeship Training (BAT) or State Apprenticeship Councils (SAC) regulations. As a result of these regulations, the only realistic source of workers entering federal and federally assisted construction projects is through apprenticeship programs approved by BAT or SACs.

In 1984, women accounted for 6.7% percent (15,294) of the total apprentices registered by BAT. It takes an average of 3 1/2 years for an entering apprentice to graduate to journeyman. Local apprenticeship programs, under the current BAT requirements, have been obligated to enroll females at one-half the percentage which women comprise the total work force in each Standard Metropolitan Statistical Area. Assuming women average 50 percent of the work

BEST COPY AVAILABLE

force, then 25 percent, or one of every four new apprentices, must be female. This means that for compliance under the apprenticeship regulations, 17,000 females need to be placed in a first year apprenticeship class of 68,000. With 310,500 women needed to meet the overall goals but only 17,000 needed for the apprenticeship goals, the construction industry obviously faces a problem. Even if local apprenticeship committees doubled their intake of women (in excess of the requirements of 29 CFR part 30), the goals for females imposed by OFCCP cannot be met. In fact, the construction industry cannot meet OFCCP goals for women through existing apprenticeship even if ALL new apprenticeship slots were reserved exclusively for women. And this, of course, would not resolve the problem of meeting OFCCP goals for minorities!

ABC is proud of our apprenticeship training in the open shop. We are even more proud of the fact that we have the highest retention rate in construction trades for all apprentices, and an amazing high retention of graduates of these programs who are minority or women. Mr. Chairman, I would like for you to consider the fact that only 35% of entrants in an apprenticeship program graduate. In union construction craft training of this 35% only 1% of minority or women graduate. The majority drop. In the open shop training sector we also face a low overall retention of 35% but we maintain nearly 100% retention of our minority and women enrollment which averages 10% and 3% respectively.

It is obvious in view of the substantial requirements OFCCP has imposed on the construction industry, the Department of Labor supports the development of innovative and untraditional programs for the recruiting and training of minorities and women. ABC urges DOL to develop and implement programs to identify potentially qualified applicants in connection with the affirmative action obligations of government contractors and subcontractors.

Further, ABC recommends that the definition of "apprentice" contained in the Davis-Bacon regulations (29 CFR 5.2(n)(1)) be expanded to include those individuals who are registered in a state, local or other federal agency-approved training program. Further, the inclusion of a "helper" classification on federal projects similar to that used in the private sector, would ease the entry of women and minorities. Employees who are normally classified as helper and who are generally entry level employees learning a trade, must be paid the journeyman rate for the trade in which he or she is being trained. The alternative to replace the employee with someone who has achieved journeyman status. As a matter of simple economics, the contractor will opt for the worker who is more worthy of the higher journeyman rate. The federal government, in its procurement practices and policies, should encourage contractors to be competitive by utilizing an employee to the full extent of his attained skill level and not at a fraction of his capacity by using a high paid journeyman to do what a helper is capable of doing. Unskilled or partially skilled workers can be trained to perform a particular task within a craft without being qualified in all skills of a fully qualified journeyman. Contractors should be urged to utilize any classification of workers to perform tasks within their attained skill level. This provides more opportunity for underutilized minority, females, handicapped, young workers and those traditionally limited in the working force. It provides an incentive and an opportunity for ambitious workers to learn a craft, task by task, progressing on the basis of individual merit and at their own learning pace. The inability to utilize helpers on federal projects in a manner comparable to private work creates a tremendous increase in federal construction costs.

BEST COPY AVAILABLE

Finally, ABC recommends that DOL promote the development of innovative training programs in the construction industry. Once such program is "Wheels of Learning", a competency-based, task-oriented training programs in 23 construction trades. "Wheels of Learning" was developed by and is offered through ABC to provide the construction industry with a comprehensive craft training program, which will teach usable skills in a timely manner, in a convenient location, and at a relatively low cost. (See Appendix A for a more in depth discussion of ABC's "Wheels of Learning" Program). ABC looks forward to co-working with DOL to assist them in developing and implementing such a program.

COVERAGE THRESHOLDS FOR THE CONSTRUCTION INDUSTRY

The current OFCCP regulations subject all federal and federally-assisted construction contractors who have contracts which meet the basic coverage threshold (a contract in excess of $10,000) to the requirements in Part 60-4 including specific minority and female utilization goals and 16 affirmative action steps. In 1981 OFCCP contemplated the established a two-tiered threshold system providing contractors with federal or federally-assisted construction contracts in excess of $10,000 to be contractually subject only to a commitment not to discriminate and to take affirmative action. These contractors would not be subject to specific goals and timetables and would not be required to take the specified affirmative action steps. The second tier would have applied to contractors with federal or federally-assisted construction contracts of $50,000 or more and which six consecutive months during the twelves months immediately preceding the contract award, the contractors employed craft workers for a total of 20,000 or more hours. OFCCP

estimates that this work requirement reflects 20 full-time workers employed over a six-month period. ABC recommends, that if OFCCP wish to implement a tiered system, the threshold levels be expanded to three levels, with additional compliance responsibility as the size of business and the contract amount increase:

Level I

<$500,000 total annual volume of business (over three years)

AND

<$100,000 in federal contract.

If both of these are met, contractor must:

- Sign an affirmative action clause

Level II

$500,000 - $5 million total annual volume of business (over three years)

AND

$100,000 - $1 million in federal contract.

If both of these are met, contractor must:

- Sign affirmative action clause
- Make "good faith" effort to meet goals
- File EEO-1 report
- If goals are not met, file narrative report

Level III

<$5 million total annual volume of business (over three years)

AND

<$1 million in Federal contract

If both of these are met, contractor must:

- Sign affirmative action clause
- Make "good faith" effort to meet goals
- File Form 257 utilization report quarterly
- Follow nine steps

BEST COPY AVAILABLE

UNVALIDATED GOALS

OFCCP currently does NOT require construction contractors to set goals and timetables or develop their own written affirmative action plans. Instead, OFCCP mandates utilization (or employment) goals for construction contractors. With the April, 1978 regulations, OFCCP set various minority goals for different geographic area and a nationwide goal for females. In 1980 OFCCP revised its minority hiring goals. This are revised with every 10-year census. These new goals are based upon minority workforce presence in Standard Metropolitan Statistical Areas (SMSA's) and Economic Areas (EA). A single minority goal covers all crafts in an SMSA or EA and each SMSA and EA has a separate goal. The nationwide goal for women is currently 6.9%.

ABC submits that neither the minority nor the female goals are attainable under the considerations imposed on the construction industry by the federal government. ABC further submits that OFCCP is and has long been aware of this discrepancy between its goals and reality. In testimony before the House-Labor HEW Approriations Subcommittee on February 5, 1980, OFCCP Director Weldon Rougeau stated," ... the goals in the construction program are goals which we admit are not necessarily based on hard data which has been obtained by the Department or any other group." At the same hearing, in response to a question about whether women trained in construction crafts are available in sufficient numbers, Director Rougeau stated, "Overall, no, not to meet all of our nationwide goals in every craft throughout the nation. We have known this for a long time."

60-638 O - 86 - 7

The goals promulgated by the OFCCP for the construction industry have no statistical basis and are arbitrarily established. The goals fail to take into consideration the variety of skills and different levels of training required for the various trades in the construction industry. OFCCP's regulations provide that all affected contractors in a SMSA must meet the same hiring goals. Subcontractors and specialty contractors engaged in the hard-to learn trades, those with long apprenticeship periods such as electrical and plumbing which have the greatest difficulty attracting minority and female trainees, realistically cannot meet the same hiring goals as other building craft employees.

USE OF QUOTAS

OFCCP has taken the position that its minority and female utilization goals are only a standard by which to measure a federal contractor's "good faith" affirmative action effort. In reality, these "goals" are enforced as quotas. According to current OFCCP procedures, a contractor who has not met his "goals," but has complied with the 16 affirmative action steps should be found in compliance. Such compliance requires sufficient documentation of contractor efforts under the 16 steps. Unfortunately OFCCP standard operating procedures provide no definition concerning sufficient documentation of the 16 steps. If a contractor is not meeting his goals, OFCCP assumes that he cannot possibly be doing enough paperwork and documentation to be in compliance. Thus, Federal contractors are reviewed with the absolute expectation that OFCCP "goals" are met.

BEST COPY AVAILABLE

Contractors who fail to meet their "goals" are usually required to sign a conciliation agreement. Such agreements cite the contractors's failure to meet a "goal" as a "deficiency." OFCCP even labels the "goals" in its conciliation agreements as "required goals."

ABC believes that OFCCP should take immediate action to end the use of quotas in its affirmative action program. At a minimum OFCCP should amend its regulations to clearly state that a contractor's failure to meet the "goals" alone should NOT constitute a basis for any administrative action. Further, OFCCP staff should constantly be reminded of this policy.

As stated earlier, the implementation of an affirmative action regulation which provides any employer with an "affirmative defense" encourages the voluntary maintenance of records is certainly a step in the right direction.

THE AFFIRMATIVE ACTION STEPS (SECTION 60-4.3)

In April 1978, OFCCP published revised affirmative action regulations for federal construction contractors. Instead of requiring construction contractors to adopt a written affirmative action plan, federal contract specifications were amended to include 16 steps. These steps include keeping lengthy lists of minority and women's groups, subcontractors, and suppliers; constant notification and recordkeeping on each new project or business development; and an extraordinary amount of documentation, including letters, memoranda, telephone logs, and more to prove compliance. All contracts over $10,000 include a listing of over 40 individual operations that must be taken

and documented, at a minimum, to show "good faith" effort to meet minority and female utilization goals. For example, a contractor must:

1. Maintain documentation of good faith efforts to employ one woman for every 20 skilled trades persons;
2. Maintain documentation that all foremen maintain a working environment free of harassment;
3. Maintain a current listing of recruitment sources for minority and female craft workers;
4. Maintain copies of letters to recruitment groups specifying employment opportunities;
5. Maintain records of all responses received to letters to recruitment groups;
6. Maintain a separate file for every recruitment group contacted;
7. Maintain a file of names, addresses, telephone numbers, and craft of minority and women applicants and a record of what action was taken with respect to each, including reasons why any applicant was not hired;
8. Maintain written records of contacts (written, telephonic, or personal) with minority and women's community organizations and recruitment sources, and schools and training organizations;
9. Maintain copies of letters sent to community organization, recruitment sources, schools and training organizations at least one month prior to acceptance of applicants for training, describing openings, screening procedures, and tests to be used in the selection process;
10. Maintain copies of diaries, telephone logs, or memoranda indicating contact with minority and women employees requesting assistance in recruiting other minorities and women;
11. Maintain records of results from contracts under #10;
12. Maintain records of contributions in cash, equipment, or personnel to DOL sponsored training programs;
13. Maintain records of hiring of minorities and women from DOL sponsored training programs.
14. Maintain copies of letters to minority and women recruitment sources informing them of DOL training programs;
15. Maintain a written equal employment opportunity policy, including identification of the EEO officer;

BEST COPY AVAILABLE

16. Include EEO policy in the company's policy manuals;

17. Post a copy of the EEO policy at all job sites;

18. Maintain documentation that EEO policy has been discussed with every minority and woman employee.

19. Maintain documentation that EEO policy has been discussed regularly at staff meetings;

20. Have copies of newsletters and annual reports that include the EEO policy;

21. Send copies of letters at least every six months or at the start of every new major contract to all recruiting sources stating the company's EEO policy;

22. Maintain copies of advertising with EEO statement;

23. Maintain copies of letters to all subcontractors and suppliers requiring compliance with EEO policy;

24. Maintain records of annual reviews of minority and female employees to seek promotions;

26. Maintain records of annual review with supervisory personnel of affirmative action obligations, including identification of time and place of meetings, persons attending, subject matter discussed, and disposition of subject matter;

27. Maintain certifications that testing, interviewing, and selection procedures meet government guidelines;

28. Maintain documentation that the EEO officer reviews all monthly workplace reports, hirings, terminations and training;

29. Have a written job description for the EEO officer including the duty to monitor all employment activities for discriminatory effects;

30. Maintain documentation that corrective action has been taken whenever a possible discriminatory effect is found;

31. Include in all subcontracts and purchase orders a government "Certification of Nonsegregated Facilities;"

32. Maintain records that prove that notices of parties and picnics have been posted and are available to all employees;

33. Maintain records of contacts with supervisors to insure privacy between the sexes with respect to toilets and changing facilities;

34. Maintain records of all contacts from minority or women subcontractors;

35. Maintain records of assistance provided to minority or women subcontractors in preparing price quotations;

36. Maintain records of all minority or female subcontracts awarded, with dollar amounts;

37. Maintain copies of solicitation to minority or female subcontractors for projects bid;

38. Submit reports to the government regarding EEO activities;

39. Maintain records for each employee of name, address, telephone number, trade, social security number, race, sex, position, dates of change in position, hours worked per week, rate of pay, and locations of work; and

40. File a monthly employment utilization report, covering work force on private projects in the area.

Failure to document just one step can result in a finding of noncompliance requiring the contractor to sign a conciliation agreement containing even more reporting requirements or face potential debartment.

The incredible paperwork burden imposed by these regulations substantially increases the overhead of federal construction contractors. Executive Order 1246 creates an average of an additional 16 hours of paperwork each month and increases administrative costs by an average of 13.6 percent.

Table C
Impact of Paperwork Required
by Executive Order 11246

	General Contractors	Heavy Contractors	Specialty Contractors	Average
Increased administrative costs due to the E.O.	13.2%	15%	13.6%	13.6%
Hours spent on paperwork	18.7 hrs.	30.9 hrs.	11.7 hrs.	16 hrs.

SOURCE: March 19, 1981 Survey of the Membership of Associated Builders and Contractors.

BEST COPY AVAILABLE

Small contractors, when faced with the recordkeeping and reporting requirements imposed by OFCCP, are unable to effectively compete on federal work. These small businesses, which usually have a small labor force and offer limited job opportunities, incur administrative costs which are far greater than any possible gain in minority and female employment opportunities.

ABC believes that at least OFCCP regulations should attempt to reduce this paperwork burden by permitting the contractor to "demonstrate" rather than "document" its actions under any mandated steps (this is assuming that OFCCP retains the "steps" which ABC believes should be terminated as they do mandate goals and quotas). However, in drafting such a proposal OFCCP must be extremely clear in its determination of how the term "demonstrate" differs from the term "document." Even then, ABC reserves judgement on support for this regulatory change until the proposed rulemaking can be reviewed.

Many of the paperwork requirements involve outreach and recruiting efforts. ABC believes that a much more effective and efficient program of outreach and recruiting can be implemented through state employment service offices around the country, all under the umbrella of the U.S. Department of Labor. These offices should develop ongoing working relationship with education and training organizations and community groups in order to develop lists of qualified applicants. Contractors could then simply solicit referrals from the Office of Employment and Training, U. S. Department of Labor. This system would be more effective than the haphazard scheme of each contractor individually trying to search out the groups and develop confidence in the quality of referrals. This would also reduce the compliance and paperwork burdens for the contractors to a more rational level.

BEST COPY AVAILABLE

Under this linkage system, a contractor would satisfy his affirmative action outreach obligations by soliciting referrals from the Department of Labor and by considering in "good faith" these referrals for employment. As under current rules, an employer would retain foul authority to decide when the individuals referred are qualified. While there would be no presumption that referrals are necessarily qualified for particular jobs, an employer would have to consider all referrals in "good faith."

SEPARATION OF PRIVATE AND PUBLIC CONSTRUCTION CONTRACTS

OFCCP has created a situation where federal contractors are being forced from the private sector, while other contractors are refusing to bid on federal work. This results in two classes of construction contractors: one which does solely federal work; the other which performs only private sector work. Based on surveys of our membership, ABC estimates that the extension of OFCCP requirements to all private work of federal contractor increases his administrative costs by approximately 25%. This added cost is directly passed on to the federal cost is directly passed on to the federal government at the expense of the American taxpayer. Therefore, MR. CHAIRMAN, either way the American taxpayer losses — increased costs and less competition for public sector projects with minimal gain in any affirmative action goals. The bottom line is that it is clear that since the implementation of the OFCCP regulations, the paperwork requirements have been a hindrance, rather than a benefit, in the area of affirmative action.

Section 60-1.7(b) of the OFCCP regulations currently require contractors and subcontractors to make certain certifications in their bids with regard to

BEST COPY AVAILABLE

certain aspects of affirmative action compliance. Many prime contractors have been obtaining the same certifications for their subcontractors. This requirement has resulted in a major paperwork burden for the submitting subcontractors and the receiving prime contractors. ABC would welcome the elimination of the subcontractor certification requirement. This was an OFCCP proposal for revised regulations in 1981, however, this step was not taken.

CONCILIATION AGREEMENTS (Section 60-1.65)

OFCCP automatically demands that contractors who have failed to meet their minority/female utilization goals must sign a conciliation agreement. Contractors have been given no opportunity to negotiate the terms of the agreement. There is no term defining the bounds of the conciliation agreement. There is no expiration date in the conciliation agreement, he or she is subject to immediate enforcement action.

Statistics in any revised regulations can serve as the beginning of any discrimination inquiry; not the end. Statistics would still be useful in establishing evidence of unlawful discrimination and could trigger audits into employment practices. The modification simply would prevent the government from finding a federal contractor to be in non compliance because of a statistical imbalance in the composition of its work force.

SUMMARY

ABC firmly believes that the government's affirmative action program has failed to meet its objectives. Further, the commitment to ease federal regulatory

BEST COPY AVAILABLE

burdens on private industry and reduce the cost of the federal government has NOT been met by OFCCP during the past years when any proposed regulations amending the current requirements have been dropped. Evidence since the implementation of these regulations, documents submitted by the construction industry to the OFCCP and to the Congress, indicating the adverse impact of the OFCCP regulations have been ignored.

ABC commends the Administration for opening up this discussion in an effort to take the needed important step toward regulatory reform. As I indicated earlier, ABC firmly opposes any mandated quotas and numerical goals which the regulations have come to mean during the past decade, and therefore withholds judgement on any upcoming regulatory changes. We support the intent of Executive Order 11246 assuring affirmative action but cannot tolerate the current problems and unnecessary costs associated with OFCCP's affirmative action program.

Rather than increasing the numbers of minorities and women in the construction industry, OFCCP has created a mind-boggling maze of paperwork and procedures through which a contractor must find his or her way. A simple pruning of this maze will not simply the quest of the construction contractor. In order to effectively free the contractor from unnecessary regulatory burdens, OFCCP must strike at the root of the problem. Therefore, ABC recommends that Congress and the Administration develop and implement an affirmative action strategy encompassing recruitment, training and hiring of minorities and women. Such a strategy will create significant opportunities for women and minorities in the construction industry and fulfill the mandate of Executive Order 11246.

BEST COPY AVAILABLE

ABC believes that effective affirmative action programs in the construction industry must center on training programs. There simply aren't enough skilled craftspeople to meet current demands and it could get worse. Competency based, task-oriented training programs provide an employer to suit their needs and workers interests. But most important to our industry is once a task module has been completed, a worker is on the job and productive. And because workers can acquire valuable skills quickly, the program offers more immediate entry into
the industry for beginners including minorities and disadvantaged youth. It is indeed training for tomorrow.

OFCCP must revise their regulations to restore the original intent of civil rights -- to ensure equal opportunity for ALL individuals and equal treatment under the law, regardless of gender or minority status.

Eliminating the mandated quotas and numerical goals, remedies would not be eliminated for victims of discrimination. The Executive Order would continue to forbid discrimination. This modification would not alter the rights of individuals who have been discriminated against. Instead, this modification is focused narrowly at ensuring that those who have never themselves suffered discrimination do not receive an unfair advantage because of race or gender. When that occurs, it occurs at the expense of an innocent person with better qualifications and who can better provide what an employer needs.

I appreciate having the opportunity to testify before this Committee today in an effort to express the concerns of the construction industry on current affirmative action programs. Our belief that affirmative action has evolved to a point where discrimination to achieve nondiscrimination is occurring is one

BEST COPY AVAILABLE

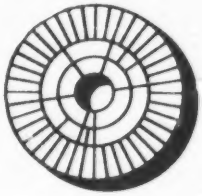
that is held by a great number of industries. Collectively, we hope that the Government can refocus affirmative action on its original intent — that of ensuring equality of opportunity to the fullest extent possible, instituting and maintaining positive steps to expand the opportunities for disadvantaged Americans, providing assistance in the form of education, training and outreach to those who would not otherwise acquire the qualifications necessary to make equality of opportunity a reality.

ABC is committed to maintaining and expanding these opportunities.

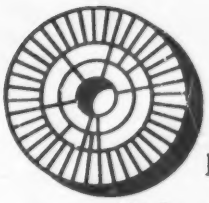
Thank you MR. CHAIRMAN.

BEST COPY AVAILABLE

The Wheels of Learning



Training Today for Tomorrow



Associated Builders and Contractors Introduce

Wheels of Learning:

An investment in better quality, lower cost construction.

The construction industry is facing the most serious skilled labor shortage in the nation's history. There simply aren't enough skilled craftspeople to meet current demands. And it's going to get worse. By 1990, studies predict there will be more than one million skilled workers needed in construction. Current training programs cannot possibly fill this need.

Fortunately, there's an alternative to traditional methods—the Wheels of Learning—which can train more workers faster. Developed by Associated Builders and Contractors, the Wheels of Learning has been hailed as the most innovative training concept in the industry. Through Wheels of Learning, contractors can provide the industry with the skilled craftspeople that are so desperately needed.

Modular Training

Wheels of Learning is a competency-based, task-oriented training program unique to construction. Covering 21 trades, Wheels of Learning provides a modular training format which allows employers to design their training program to suit their needs and their workers' interests.

BEST COPY AVAILABLE

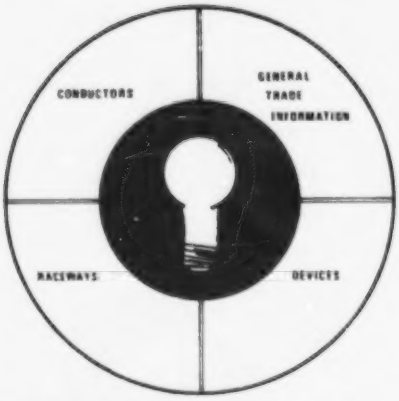
An outstanding training program with advantages for workers, construction clients and contractors.

Each trade is broken down into individual skill modules. A module can be used to learn a specific skill or, in conjunction with other modules, can form the basis of broader training programs, including formal apprenticeships. Its combination of classroom and on-the-job training offers students the best of both worlds.

Productivity and Flexibility

But most important to contractors, once the first module has been completed, a worker is on the job and *productive*. And because workers can acquire valuable skills quickly, the program offers more immediate entry into the industry for beginners, including minorities and disadvantaged yo[illegible].

Students receive instruction from skilled craftsmen.



Each trade, like that shown in the electrical "wheel" above, is broken down into individual skill modules.

Flexibility is one of the program's biggest advantages. Students advance at their own pace and can learn in group or individual settings. Offered nationwide through [illegible] chapters, students are free to move without interrupting their studies. Through Wheels of Learning, students can take classes in one trade or many, making them more valuable *and* productive employees. Experienced workers can also use Wheels of Learning to "brush up" on their skills or learn new ones. And best of all, the program's low cost makes it easier for contractors to train as many workers as needed.

It's an ambitious program, but one which is crucial to the industry's future—through the use of the Wheels of Learning, contractors can now guarantee themselves a steady supply of skilled workers. Through Wheels of Learning, ABC is truly training for tomorrow.

BEST COPY AVAILABLE

The Wheels of Learning Works:

"Wheels of Learning is the b training out there. I've noticed that students tend to move up through the ranks faster and take on responsibility sooner because they're well-trained."

—Louis Jones
Freeport Constructors, Inc.
Freeport, Texas

"My ability to train my people is the only thing that will keep me in the construction business. I can't depend on my competitors to train my people for me—I've got to do it myself."

—Ted Kennedy
BE & K, Inc.
Birmingham, Alabama

"Wheels of Learning is the greatest thing that's ever come about in the construction industry. When a worker finishes his training, he gets a certificate, just like a diploma. He can show that to any employer and it proves he's qualified."

—Tom DeMaat
DeMaat Brothers Painting
Contractors, Inc.
Grand Rapids, Michigan

Making America Strong
Through Improved
Productivity

The Wheels of Learning
is a joint effort of
Associated Builders and Contractors
and
Merit Shop Foundation,
a non-profit educational foundation.

For further information:

Associated Builders & Contractors
729 15th Street, N.W.
Washington, D.C. 20005
(202) 637-8800

BEST COPY AVAILABLE

Mr. EDWARDS. Mr. DeWine.

Mr. DEWINE. Mrs. Hails, let me ask you if you could take me through a typical case.

I guess I first should ask, are you familiar with any typical case? Have you been involved in one, or any one you know of where there has been—a company contractor has failed to meet the goals. Now can you take me through what the next steps are? What the Government has done?

Mrs. HAILS. No, I can't take you through a typical case. I don't build Federal projects, because——

Mr. DEWINE. Yourself, you do not?

Mrs. HAILS. I do not.

And the reason I do not is because of the paperwork burden. I just refuse to do that. I can't afford to work for the Government. We don't have the staff to take care of those kind of things.

Mr. DEWINE. OK.

What I'm looking——

Mrs. HAILS. Ah, I have friends who work for the Federal Government. If you are asking me for specific cases, I cannot give you one right at this time. I have heard a lot of talk. There is an awful lot of people who discuss this, a lot of time.

I can submit you some cases, if you would like.

Mr. DEWINE. I wonder—that would be fine if you could, because what I don't see, or at least I don't get in either your written testimony or in your testimony today is a real feel for exactly what is happening out in the field.

You've talked about the fact that these are very burdensome requirements. You've talked about the fact that the goals have actually become quotas. But I would like to know—exactly—give me a case of what has happened. What has the Government done?

I want to know how these are actually being enforced.

Mrs. HAILS. Well, you know your compliance officers have been using goals as quotas. The goal for women on a construction site is 6.9 percent. That is a quota, because if you don't meet that goal—if you do not meet every step that is there that the Federal Government has down, then you could be held in noncompliance, and have to sign this form saying, "I have done something wrong."

Mr. DEWINE. Do you have any figures as to how many of your people have reached that stage, where the Government has said, "You have not complied, you have to sign this form"?

Mrs. HAILS. No.

Mr. DEWINE. Do you have any figures about how many have been denied the opportunity to do business with the Federal Government?

Mrs. HAILS. No, I do not.

Mr. DEWINE. Who have said, "Hey——

Mrs. HAILS [interrupting]. I know an awful lot of people who do not do business with the Federal Government because of these regulations that are put on them. Because you cannot find 6.9 percent, and you're talking about every———

Mr. DEWINE. OK.

Mrs. HAILS [continuing]. Craft, every craft on that job site, and I can speak——

Mr. DEWINE. I don't question——

Mrs. HAILS [continuing]. Better as——

Mr. DEWINE [interrupting]. Excuse me, I don't——

Mrs. HAILS. Yes——

Mr. DEWINE [continuing]. I don't question what you are telling me. I don't question a thing you have told us today. But, I just want to know—you say it's impossible to reach the 6.7 or 6.9 figure. OK, I want to know what happens next. No one out there in the field is reaching it, is what you are telling me.

OK, so no one reaches it. So what happens next? What is the Government doing?

Mrs. HAILS. They sign a form called a conciliation agreement saying that they are in noncompliance——

Mr. DEWINE. Then what happens?

Mrs. HAILS. They can face debarment. They can be fined——

Mr. DEWINE. But you don't know how many have been debarred?

Mrs. HAILS. No, I do not.

Mr. DEWINE. OK.

What happens after the conciliation agreement is signed? What happens then? How does it work? I don't understand how it works.

Mrs. HAILS. How does what work?

Mr. DEWINE. The agreement that they are forced to be—to sign. They sign this agreement, then what happens? They still can't meet the 6.7 or the 6.9. What happens then?

Mrs. HAILS. There is the possibility that they can never work on a Federal project again.

Mr. DEWINE. But you don't know—you can't give me any figures of how many people in your industry that has happened to?

Mrs. HAILS. No.

Mr. DEWINE. Thank you.

Mr. EDWARDS. Weil, I'm afraid the fact is that nobody ever does get debarred. Certainly not in the last 5 years.

Maybe in history there have been a handful, four or five, but not under this administration, isn't that correct?

Mrs. HAILS. I don't know, I don't know that for a fact.

Mr. EDWARDS. Sir?

Mr. APRUZZESE. No, that's correct.

Mr. DEWINE. I wonder if Mr. Apruzzese would like to comment on any of my questions I have asked, as far as the people you represent.

Mr. APRUZZESE. Well, I haven't—the only debarment case that I have been involved in in recent years was the Prudential case that was mentioned earlier by Congressman Sensenbrenner.

I was cocounsel in that matter with the firm of Covington & Burling for the Prudential Insurance Co., and Prudential was temporarily debarred. It was the largest debarment case in the history of the Government.

And, as has been brought out, they were totally and completely exonerated. Now, that debarment proceeding, or the litigation that flowed from it, it was very extensive and cost that company substantial sums of money, and tremendous publicity that worried people all over the country.

Consequently, that is one of the cases where debarment flowed. With regard to any of the other cases where contractors may currently be debarred, I've had a fair amount of experience in the con-

BEST COPY AVAILABLE

struction industry. None of my clients in the past, oh, 3 or 4 or 5 years have been debarred.

But I would submit to you that a lot of activity in the construction industry, especially in my State, which, as a result of charges by the Justice Department against major crafts, and some EEO charges did in fact end up with conciliation agreements or with court orders that have been enforced so that some of the crafts that did not have enough minorities in them tried to comply. In many of those cases, as a result of past discrimination, there are ongoing programs to correct that discrimination.

Mr. DEWINE. What would these conciliation agreements normally say? Can you give me a typical one, there——

Mr. APRUZZESE. Yes.

Mr. DEWINE [continuing]. Maybe no typical one, but can you just give me an example?

Mr. APRUZZESE. Well, you must bear in mind congressman, that typically in a case where you are in court, such as the Federal District Court matters I've been involved with, the allegation is made that the company has, in fact, discriminated. Now, what the conciliation agreement does is to invariably start with a nonadmission clause, where the employer says, "No, I have not." And then it sets up goals and timetables, it says that within this particular craft, we will have a goal of such-and-such a percentage, and by a certain year you are expected to have that number.

So that typically in the construction industry, that is not unusual in resolving a charge of discrimination where the parties settle.

Mr. DEWINE. Well, let me take that one step further, if I could.

Is that—is it your testimony then that that becomes an absolute quota at that point?

Mr. APRUZZESE. Well, I would say that——

Mr. DEWINE. Or not?

Mr. APRUZZESE. Pardon?

Mr. DEWINE. Or not?

Mr. APRUZZESE. I would say that the emphasis, or the club, if you will, in an enforcement proceeding, becomes, "you are shy of that goal," and, in the construction industry, I have been involved in cases where they've expected as high as 30 to 35 percent of a particular craft to be minorities, and I submit to you that it is humanly impossible to meet that goal, in particular crafts, because of the training that is needed. But, nonetheless, they have been imposed.

It creates an atmosphere of concern, worry, of fear that you may in fact be debarred, or a charge can be brought against you. That's been my experience in some of these cases.

Mr. DEWINE. Well, the chairman would probably argue and I won't put words in his mouth, but—if hardly anyone ever gets debarred, there is maybe not a great deal to fear.

Mr. APRUZZESE. Well——

Mr. DEWINE. That maybe the club is really not there. But your testimony very clearly is that the club is there, and it is intimidating a lot of people. I would like you to reconcile those two points of view.

Mr. APRUZZESE. Well, I wouldn't say—what you're saying is if the Government doesn't hardly use that to enforce that goal, why worry about it. Is that the question?

Mr. DEWINE. Well, I certainly, if I was a lawyer, I wouldn't ever advise a client not to worry about it, I guess I wouldn't go that far. But, if it is as sparingly applied as the testimony we have heard this morning—I'm just wondering—I don't question that it does serve as an intimidation either, but I guess I don't quite understand——

Mr. APRUZZESE. Well, let me put it this way.

We've often heard no one likes to live under a benevolent dictatorship—you never know when it's going to change. I dare say—I represented a contractor on a Federal project in Cincinnati, I think it was a very large—my recollection is, a post office building, or something—and he, in fact, was debarred. This goes back a few years. Hubert Humphrey was Vice President, and I think chairman of the Equal Employment Opportunity Committee.

And this company, in a joint venture with Huber, Hunt & Nichols, was in fact disbarred, because the Government said, "you don't have a large enough percentage of minorities on your project."

And the interesting thing about it—in the construction industry, particularly where Davis-Bacon is concerned, and we pleaded that, and ultimately got off the debarred list—my client never had worked in that area. Ever. Came from New Jersey with Huber, Hunt & Nichols as a joint venture, neither one of them had ever worked in that precise location because of Davis-Bacon, hired union crafts.

Now, if the percentages weren't good, they'd say, "OK, step aside, you can't work, you don't have the right percentages." Enter the next contractor, I don't care who he is, he goes to the same pool of labor, same percentages, same "get out of the way, go on to the next one."

The point is, it didn't get at the root. And my answer to you is, if I'm a businessman, and I take risks, I don't want to be under a benevolent dictatorship, or I don't want the possibility of an agent saying, "you are now going to be charged with violating this standard because you don't meet that particular goal."

I don't think it's an answer to say that, well, gee, they may not be enforcing it, so what are you worried about. I don't like to live under the sword of Damocles, and I don't think we should expect businessmen who do business with the Government to do that.

Mr. DEWINE. Thank you.

Mr. EDWARDS. Well, all the civil rights laws have some sort of, as you would describe it, threat, such as discrimination laws with regard to public facilities. Would you make everything voluntary?

Mr. APRUZZESE. No, sir; I think they ought to have a threat, and in my testimony I said these——

Mr. EDWARDS. What would that be?

Mr. APRUZZESE [continuing]. These laws ought to be vigorously enforced, and if the Government believes one of its contractors is in fact discriminating, they can bring a charge. There are procedures to do that, either through the Equal Employment Opportunity Commission, or other types of cases. And they should bring them to book.

As a matter of fact, I heard Clarence Thomas speak at the Southwestern Legal Foundation 2 weeks ago, in Dallas, TX, and he says they have more cases that they are bringing toward enforcement

and charges against employers this year than perhaps in the last 5 put together.

Vigorous enforcement of these laws is important. Penalties and remedies are important. But, by the same token, you can't take an artificial—or a standard imposed by fiat, if you will, that you must meet this goal——

Mr. EDWARDS. Well, how do you measure it——

Mr. APRUZZESE [continuing]. Which gets translated into a quota.

Mr. EDWARDS [continuing]. If you don't have any goal or anything to measure your performance by?

Mr. APRUZZESE [continuing]. You take a——

Mr. EDWARDS. That is the purpose of a goal and a timetable. Mrs. Hails has mentioned 6.9 percent as a quota.

Well, as long as there are decent efforts made to make opportunities for women to work in your organization, nobody is going to say that you have to hit a quota of 6.9 percent. And nobody ever has. Not one person—not one firm has ever been debarred for not meeting the quota that you mentioned there.

I just wonder, it didn't happen before this Executive order was in place. The industry actually, of builders and contractors, really didn't have a very good record, did it, in hiring of minorities and women——

Mr. APRUZZESE. Well, when you say "building" and "building contractors," when you talk about the construction industry——

Mr. EDWARDS [continuing]. You're not giving them a good grade either. As a matter of fact, where I come from, the painters for many years were all white males, and it was only recently that they've been integrated.

Mr. APRUZZESE. Now, I would call your attention to the fact that, Congressman Edwards, that until 1959, we had no legislation that said, as a matter of law, it was appropriate for a construction union to negotiate with a contractor an exclusive hiring-hall clause. That was placed into the law in 1959, and when that went into the law, it was with a clear understanding, on behalf of anyone who had enough brains to come in out of the rain, that it was going to be a long time before minorities got those jobs.

Mrs. HAILS. Mr. Chairman, may I comment on that?

Mr. EDWARDS. Of course.

Mrs. HAILS. I would like to comment on your statement that—you know, there are not an awful lot of women who really want to work on a construction jobsite. There are some.

We have quite a few minorities working on our jobsite. In my own company it is probably 20 percent.

But there is not an awful lot of opportunity there now for those people to advance.

If you have—if you are supposed to meet a goal of 6.9 percent, and you can't find women, and you put those people—you go out and you hire some—say, if you only hire 3 percent, you've got to find them somewhere. And most times they are untrained. It is a safety hazard. They are unqualified, and—plus, how do you suppose they feel, knowing I was hired only because they needed to reach a goal, not because of what I know, and what I can do.

We all like to succeed because we deserve to succeed, but the problem is we don't have the opportunity to train these people, and

we don't want them to just stay laborers for the rest of their life. They should have the opportunity to advance.

Mr. EDWARDS. Well, thank you. You are saying that goals and timetables result in discrimination, and the hiring of unqualified people.

During hearings in July, Assistant Attorney General Reynolds was here, and we asked him for some cases where this was so. Can you cite for us any cases where goals and timetables resulted in discrimination against one class of Americans?

Mrs. HAILS. A specific cite?

Mr. EDWARDS. Yes, some——

Mrs. HAILS. No, I cannot.

I can—I know it happens. I know that if you have a young, white male who goes through an apprenticeship training program, and if a general ccntractor—I have heard contractors speak of this before—if they have to meet their goals, they will hire someone else to replace that young male, or that white male. To me that's discrimination.

Mr. EDWARDS. Well, it would be helpful to the committee if we could get specific examples. It would——

Mrs. HAILS. I can submit——

Mr. EDWARDS [continuing]. Be helpful, because——

Mrs. HAILS [continuing]. Yes, OK.

Mr. EDWARDS [continuing]. Mr. Reynolds couldn't come up with any, and it's a little bit frustrating to have general testimony. I certainly know about paperwork. I was in business for myself before I came here.

[The information follows:]

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC, January 23, 1986.

MS. BARBARA F. BEATTY,
Director, Government Relations, Associated Builders and Contractor, Inc., 729 15th Street, NW., Washington, DC.

DEAR BARBARA: I am writing to follow up the Subcommittee hearing on November 7, 1985 on affirmative action and federal contract compliance. At the hearing, Jean Hails, on behalf of the Associated Builders and Contractors, testified that she would provide the Subcommittee with specific examples where goals and timetables resulted in discrimination against a class of persons.

To date, the Subcommittee has not received this information. Because the record is otherwise ready for publication, the Subcommittee would appreciate receiving this information by February 6, 1986.

Thank you for your attention to this matter.

Sincerely,

STUART J. ISHIMARU,
Assistant Counsel.

I hate paperwork, and I wish people in business would tell us, and we would insist that it be cut way down, but nobody ever brings it up and puts it on the desk and says, "Look, this is the awful procedure that we have to go through." So, please keep that in mind.

Counsel?

Mr. ISHIMARU. Thank you, Mr. Chairman.

We keep hearing allegations of quotas being forced upon contractors, but nobody ever 'fesses up to the use of quotas. Do the members of the Associated Builders and Contractors and the Chamber

of Commerce use quotas? Who are these people? Can you cite me some cases of the use of quotas by contractors by actually naming names?

Mr. APRUZZESE. Well, in my experience, and again, my experience with construction industry problems is generally, but not totally, but generally within the State of New Jersey.

We had a very tough time in our State trying to bring around equal employment opportunity to the extent that we could in the construction industry. In the city of Newark, the Star-Ledger, when Federal projects were being built, would place on the front page the percentages every day as to the number of minorities working in a given craft.

We had programs—I can remember a specific case—more than one—but, when the Newark International Airport was being built, I represented the general contractor that was building that project for the Port Authority, and there were goals and timetables on that project. And I might say to you that they were very substantial percentages. There was no way, taking the existing number of people in the craft, that those percentages could be met.

And, in the effort to try and insist upon those goals, an action was instituted under the contract against the contractor, and the allegation was that there were not enough minority ironworkers. Well, when the complaint was made that there weren't enough minority ironworkers, two black ironworkers were sent from a different source to the job site, and lo and behold the ironworkers union sent two black ironworkers for that job, then the employer had, and was in fact confronted with four ironworkers, and the question was, which two did he hire, and all four were black.

And that contractor's contract was threatened to be terminated because of the fact that the percentages were not appropriate. Well, that resulted in a very substantial amount of litigation.

I think one of the problems here is that the goal and timetable clearly, in my judgment, certainly in that industry, was used as the catalytic agent to persuade people, cajole them if they couldn't actually threaten them, and bring a charge against them, or cancel a contract.

As a result, the employer then tried to enter into some kind of agreement, if possible, if he could retain the project, and that type of agreement, conciliation, Court approved, what have you, became the modus operandi.

So it was in fact used as a tool in many instances, and continues to be used as a tool, with the threat of litigation, debarment, et cetera. And that's been the way it's used.

Mr. ISHIMARU. Let me turn for a second away from construction contractors. I would assume the chamber has members from all over the business.

Mr. APRUZZESE. A proper assumption.

Mr. ISHIMARU. Right. And the largest Federal contractors are defense contractors. Rockwell is the largest Federal contractor, followed by McDonnell Douglas and General Dynamics. Do these corporations use quotas, to your knowledge? Can you cite me any firms, nonconstruction firms, in the chamber that use quotas?

Mr. APRUZZESE. Well, I think where you have a—any contractor who does work for the Federal Government, these contractors have

to be concerned about goals and timetables that are set. And, these contractors certainly have to make every effort to conform to those.

There are many major companies who are in the chamber who have either entered into conciliation agreements in one form or another, or, in order to avoid that type of litigation, have adopted affirmative action programs which include goals and timetables.

Mr. ISHIMARU. Can you cite me any cases, though, of the use of quotas, of fixed, unflexible quotas by a nonconstruction contractor?

Mr. APRUZZESE. I am told that there are some cases. I can't give you the specific citation at this point. I will, however, endeavor to get those from the Justice Department person who has told me that there are such, and try to submit them.

[The information follows:]

U.S. HOUSE OF REPRESENTATIVES,
COMMITTEE ON THE JUDICIARY,
Washington, DC, January 23, 1986.

Ms. VIRGINIA B. LAMP,
Labor Relations Attorney, Business-Government Policy Department, Chamber of Commerce of the United States, 1615 H Street, NW., Washington, D.C.

DEAR GINNY: I am writing to follow up the Subcommittee hearing on November 7, 1985 on affirmative action and federal contract compliance. At the hearing, Vincent Apruzzese, on behalf of the Chamber of Commerce, testified that he would attempt to provide the Subcommittee with specific examples of the use of fixed and unflexible quotas by non-construction contractors.

To date, the Subcommittee has not received this information. Because the record is otherwise ready for publication, the Subcommittee would appreciate receiving this information by February 6, 1986.

Thank you for your attention to this matter.

Sincerely,

STUART J. ISHIMARU,
Assistant Counsel.

Mr. ISHIMARU. Thanks.

Mr. APRUZZESE. I would say to you, however, that—you know, to come out with a given case where someone says, "this is in fact a quota, and let's not quibble around, this is it, you didn't meet it, and you're going to be debarred." That's a little difficult, perhaps, to do.

Mr. ISHIMARU. But if contractors are concerned with having quotas forced upon them, we still aren't able now to cite any cases where contractors are saying, "this is a problem for me."

Mr. APRUZZESE. The only thing I can tell you, from my experience—I've represented people who have, in fact, been disbarred. I've told you about two of them in my testimony. One, the largest case of disbarment in the history of this Government, and another one happened to me in the construction industry in Cincinnati.

Now, those are two cases. I heard the chairman say there are only a handful, or maybe there are only a handful recently, but the fact of the matter is, that threat is there, and if you do not do something to comply and spend much money for it, it becomes a serious cost and expense.

Mr. ISHIMARU. Assistant attorney general Reynolds said last week, in Wilmington, DE, that quotas are being used as a ceiling to keep out qualified women and minorities. Can you cite me any cases where that has been the case, where once a corporation fills

its quota of women and minorities then other qualified people are not considered?

Mr. APRUZZESE. I can't currently give you a specific example. I think the—one point ought to be made in discussing this whole area of, you know, timetables or goals and quotas is—in a lot of respects, people are talking about semantics. It can be an exercise in semantics. I think any wordsmith knows that.

So that the tendency, the emphasis, the threat, that whole approach, at least in my experience, has in fact been there, and it has been used. The difficulty with all of that—it leads to all kinds of problems that are—if some people say, unforeseen, real.

I had a case where the employer I represented, as a result of an EEOC charge, was hiring people to the tune of 29 percent to correct previous imbalance, if you will.

Mr. ISHIMARU. This is a title VII case, though, not a contractor case, is that right?

Mr. APRUZZESE. No, it wasn't. It wasn't. It was a——

Mr. ISHIMARU [continuing]. A contractor——

Mr. APRUZZESE [continuing]. A title VII problem. But it involved a layoff, and then the question becomes, "who gets laid off?" That kind of a problem.

Mr. ISHIMARU. Sure, but we're mixing apples and oranges here, aren't we, with title VII and Federal contract compliance under Executive Order 11246.

The basic premise under title VII is that there are individual victims. Under contract compliance, we're trying to do something prospectively, something positive. What would either of you do as a prospective requirement on Federal contractors? What should be required other than voluntarily keeping paperwork, and voluntary goals and timetables? I haven't heard anything so far about what the mandatory alternatives should be.

Mr. APRUZZESE. You have an affirmative obligation not to discriminate in the hiring or promotion of people, based upon, you know, race——

Mr. ISHIMARU. Yes, but——

Mr. APRUZZESE [continuing]. Creed, religion, et cetera, but you're saying, "well, how is that enforced."

Well, it's enforced like any other law of the land. How do you stop people from committing crimes? How do you enforce any law? You go after the people that you don't think are doing it.

Mr. ISHIMARU. So, we do it on a case-by-case basis, even though the OFCCP brings a couple thousand compliance reviews a year?

Mr. APRUZZESE. You do it on a case-by-case basis, right, and you establish discrimination, and you follow due process, which is what we're accustomed to doing in this country.

Mr. ISHIMARU. So, what type of guidelines would there be out there for Federal contractors to follow? What would a Federal contractor have to do to meet the requirements of prospective affirmative action? We don't know, we're back to the fuzzy notions, after-1965, that were out there, and nobody did anything for a number of years, until goals and timetables came about.

Mr. APRUZZESE. I don't know that you——

Mr. ISHIMARU. What method should we use?

Mr. APRUZZESE. I've already indicated what I think is the method that you should use——

Mr. ISHIMARU. Would the——

Mr. APRUZZESE [continuing]. A standard of nondiscrimination, and you try and enforce the law against those who have discriminated. You're saying that there is no way to approach the problem unless you establish some quota system.

Frankly, if people expand their applicant pool, if people have outreach programs, if they have training programs, if they invite everyone in, they let them know they're equal opportunity employers—that sort of thing results in a much different applicant pool than if they do not do things like that. And I submit to you, on a case-by-case basis you can, in fact, find out whether an employer has discriminated or not, it they're doing all of those things, and still have a workforce that doesn't have minorities represented in reasonable percentage.

Mr. ISHIMARU. So you would shift the burden then, going from the contractor having the burden to do certain things, to the Government going after contractors on a case-by-case basis?

Mr. APRUZZESE. Yes, sir.

Mr. ISHIMARU. And fishing out individual cases of——

Mr. APRUZZESE. Yes——

Mr. ISHIMARU [continuing]. Discrimination——

Mr. APRUZZESE [continuing]. Yes, just like they enforce any other law that we have.

Mr. ISHIMARU. Thank you very much.

Mr. EDWARDS. Mr. Kiko.

Mr. KIKO. I have a question for—I hope I pronounce it right—Mr. Apruzzese.

Mr. APRUZZESE. Apruzzese.

Mr. KIKO. Apruzzese, right.

I just wanted to make a quote here from testimony by Nathan Dershowitz in testimony that was given in the Senate on affirmative action. I'd just like your comment on it.

He states:

> For example, it is permissible and desire, in our view, for an employer to conduct recruiting efforts in areas where minorities not previously sought out are concentrated, but it is impermissible for the same employer to consider race or national origin of a particular applicant in deciding whether he or she gets a job. Similar principles apply to affirmative action in the education setting and elsewhere.

If you do away with using statistics as a method to bring an action against a company, would you still be able to use statistics to conduct an investigation? Couldn't you still use that investigation to show that there was discrimination and thus bring an action against somebody for discrimination that is shown?

Mr. APRUZZESE. Yes, I certainly think you can. It's like any other evidential type of hearing. That is a legitimate basis upon which to show a particular employer may, in fact, be discriminating. Nothing wrong with trying to show that.

What the population mix is in a given area, or in that area where he seeks applicants, and it seems to me that any good lawyer would force an employer to demonstrate what efforts have been made, and he could use that as evidence.

Mr. KIKO. I would also like your opinion on, when one would classify some person as a minority, how far back in the generation do you think somebody could go, or how far back does the Government go to see if one is a black or Hispanic or of whatever race?

Mr. APRUZZESE. I don't know quite ——

Mr. KIKO. How does the Government do that?

Mr. APRUZZESE. I don't know. I have never heard it said that they go back 20 years, or 30 or 50. I don't know.

Mr. KIKO. You've seen the Reichstag laws, which Mr. Sensenbrenner mentioned in the beginning of the hearings, where people were classified by their race, and religion and he was trying to make that point.

I have no further questions.

Mr. EDWARDS. Thank you very much. You've been very helpful.

Mr. APRUZZESE. Thank you.

[Whereupon, at 12:47 p.m. the subcommittee was adjourned.]